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ABSTRACT

Eight papers originally presented during the 1981 annual meeting of the National School Boards Association's Council of School Attorneys are collected in this publication. The topics, of interest particularly to school attorneys, include text and library book selection and the First Amendment; the courts' criteria for awarding attorney fees against school districts; recent developments in interpretation of the regulations related to the Education for All Handicapped Children Act; religion in the schools; sexual harassment; school board and school district liability; regulations regarding bilingual education and sex discrimination in schools; and desegregation litigation. (PGD)

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School Law Seminar Proceedings 1981

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Membership in the Council is open to attorneys at law who are licensed to practice before the highest court of any state of the U.S. or before a court of record of the U.S.; and who are (or have been within the immediate past 2 years) attorneys for a local public school district, a state association of local school boards or any public junior or community college. The entire membership of any state council of school attorneys sponsored or recognized by a state association of local boards affiliated with NSBA may secure integrated membership with the Council.

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Active Members of NSBA are the 49 state associations of local school boards, the Hawaii State Board of Education, plus the boards of education in the District of Columbia and the Virgin Islands. Nearly 1,350 local school boards are NSBA Direct Affiliates.

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National School Boards Association
Council of School Attorneys

SCHOOL LAW SEMINAR PROCEEDINGS: 1981

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FOREWORD

On April 10 and 11, the 1981 annual meeting of the National Council of School Attorneys was held in Dallas, Texas. Presentations at that meeting covered a variety of topics of major importance to school attorneys, running the gamut from the First Amendment to the Fourteenth, from sexual harassment of employees to religion in the schools. To maximize the benefit derived from these presentations, they have been compiled in this publication, with the intent that it might serve as an initial reference for school attorneys in their daily confrontations with the problems presented.

I offer my sincere thanks for all the time and effort expended by the contributors to this publication. Furthermore, I would like to thank Eve Malakoff for the many hours she has spent in editing and insuring the accuracy of this publication.

Sincerely,

Ralph D. Stern, Chairman
NSBA Council of School Attorneys
June 1, 1981

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TEXT AND LIBRARY BOOK SELECTION AND THE FIRST AMENDMENT

By: Carmela M. Bowns

INTRODUCTION

In the past decade, it has become more and more frequent to find book selection and removal controversies reaching the federal courts. These controversies center principally on school board efforts to remove certain reading material from school libraries, to delete books from curriculum lists, or to eliminate or forbid the teaching of certain classes as part of the school curriculum.

Since the issues raised by these controversies are not ones that every attorney deals with on a daily basis, they present the sort of questions that often do not get researched or studied by school attorneys until the problem arises. While we may know the issues are out there somewhere, until we are forced to become experts on the subject, we are happy to stay busy working on other problems. However, once the issue is raised, it usually is as much a political as a legal issue and is accompanied by vocal community discussion, strongly held board positions, and a demand for immediate answers regarding the board's authority and powers.

Very simply, text selection and removal controversies center on two themes: First Amendment rights and school board prerogatives. To date, cases have fallen relatively cleanly into one of two categories. On the one hand, there is the line of authority, stemming from *Presidents Council, District 25 v. Community School Board No. 25,* [1] a Second Circuit decision that broadly holds that school boards have the authority to select and to remove library books and textbooks from school facilities and curricula, with only very narrow exceptions. This line of cases often is represented by the statement that books do not acquire "tenure by shelving."

The other line of authority, citing as the leading case *Minarcini v. Strongsville City School District,* [2] a Sixth Circuit decision, generally holds that books may not be removed from the school curriculum or library because they are contrary to the political or social views of board members.

DISCUSSION OF CASES

To the present time, the U.S. Supreme Court has not accepted a case or expressed a clear view on the matter. The 1968 case of *Epperson v. Arkansas*, [3] is the nearest the Court has come to addressing these issues.

Epperson involved a challenge to an Arkansas law which made it unlawful for a public school teacher to teach the theory of evolution or to adopt or use a textbook teaching that theory. The Court declared the law unconstitutional because of its conflict with the constitutional prohibition against state laws respecting an establishment of religion or prohibiting the free exercise thereof. The Court found that the "overriding fact" was that Arkansas selected one theory of creation and forbade its being taught solely because that theory conflicted with a particular religious group's interpretation of the Book of Genesis. [4]

While declaring the statute a violation of the First Amendment establishment and free exercise provisions, the Court made a strong and clear statement regarding the role of the judiciary in public school administration.

> Judicial interposition in the operation of the public school system of the nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. [5]

Note, though, that the Court continued by saying:

> On the other hand, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

> As this court said in *Keyishian v. Board of Regents*, the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." 385 U.S. 589, 603 (1967). [6]

These statements confirm the traditional role of local school authorities in operating and controlling schools, while cautioning that such authorities are not completely unrestrained. Local school authorities will not be permitted to violate constitutional rights or requirements. In *Epperson*, the Court acknowledged the state's right to control its public school curricula, provided that such control is not based upon reasons that violate the First Amendment.

In his concurring opinion, Mr. Justice Black reaffirmed the right of local school authorities to control and prescribe curriculum, including their authority to withdraw academic as well as controversial subjects from the curriculum.

> It would be difficult to make a First Amendment case out of a state law eliminating the subject of higher mathematics, or astronomy, or biology from its curricula.
>
> . . . .
>
> [T]here is no reason I can imagine why a state is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools. [7]

In Justice Black's view, states should be free to choose their own curriculum "so long as their action does not palpably conflict with a clear constitutional command." [8]

It is precisely this question of when, if ever, local school board decisions either "directly and sharply implicate basic constitutional values" or "palpably conflict with a clear constitutional command" that the cases discussed in the following sections raise.

As the earliest case, *Presidents Council, District 25 v. Community School Board No. 25* [9] is most frequently cited for the proposition that a school board is authorized to remove books from school libraries and that such removal, even when based on board members' political or personal philosophies, does not raise constitutional issues justifying federal court intervention or review.

The facts of that case are as follows: At an executive board session in 1971, the school board voted to remove all copies of the book *Down These Mean Streets*, by Piri Thomas, from the district's junior high school libraries. A few months later, the board modified its action by permitting the book to be retained at schools that already had the book, but required that it be loaned only to parents, who could then determine whether or not their children could read it.

Down These Mean Streets is an account of a Puerto Rican youth growing up in Spanish Harlem in New York City. Some parents had objected to the violence, sex, and drug exposure in the book, as well as to its graphic language, claiming that the book adversely affected their eleven to fifteen-year-old children. On the other hand, those arguing against removal of the book found its message and manner of acquainting predominately white middle-class students with the lives of their contemporaries appropriate. [10]

The board's action of restricting access to the book was challenged by parents, students, and teachers of the district as violative of their First Amendment rights.

Neither party disputed that the board had been properly delegated authority by the state to select books and instructional materials for schools. It was also clear that administrative and judicial review of board action was available under state law.

After acknowledging the deference that is to be given local educational authorities by the courts, the circuit court stated that its role was not to review the wisdom or the efficacy of a local board decision. Instead, its function was to determine a constitutional issue: Had the board actions transgressed the First Amendment rights of parents, students, or staff? [11]

On the facts before it, the court found "no impingement upon any basic constitutional values." [12] Part of its rationale for so finding was that it predicted that the choice of books to be in a library would never be a harmonious one. It felt that judicial intervention in book-choice arguments would result in inappropriately elevating to constitutional proportions the intramural strife between those who selected texts and those who dissented from their selection.

The court noted that, contrary to *Epperson*, no First Amendment religion question was presented, nor was teaching a particular theory or doctrine itself banned. Discussion of the problems of barrio life, drugs, or crime had not been banned; only one vehicle of presenting them, *Down These Mean Streets*, had been eliminated. The court concluded that since the board had the delegated authority initially to select which library books would go into a school, it had the corresponding authority to remove books. The court found it clear that "books which become obsolete or irrelevant or were improperly selected initially, for whatever reason, can be removed by the same authority which was empowered to make the selection in the first place." [13]

In assessing whether other First Amendment rights were violated, the court, without much detailed analysis, found no showing of a curtailment of freedom of speech or thought since the topic of barrio life in New York City or the book itself could still be discussed.

It is not clear whether the court was going so far as to say it would never see a First Amendment problem regarding book removal or restriction or whether it was saying that, on the facts presented, it saw no intrusion on First Amendment rights. To say the first seems unrealistic in light of other issues (such as teacher termination) that, although committed to local control, are frequently reviewed by a court. Yet, after considering the difficulty of identifying and defining a First Amendment violation when a book is removed, the court's reluctance to further analyze the allegation can be understood.

Several other circuits have since followed the result in *Presidents Council*. A 1980 case from the Seventh Circuit, *Zykan v. Warsaw Community School Corporation*, [14] held that plaintiffs failed to meet the relatively high threshold required for them to establish that a cognizable First Amendment violation had occurred.

In this Indiana case, the defendant school board had removed the textbook *Values Clarification*, had prohibited a women's literature teacher from using several books (*Growing Up Female in America, Go Ask Alice, The Bell Jar, The Stepford Wives*) in her class, and had established a policy prohibiting reading material that "might be objectionable." [15]

Plaintiff students claimed that the board acted because the books offended their social, political, and moral tastes, not because the books, taken as a whole, were lacking in educational value. These actions, plaintiffs claimed, violated their First Amendment rights by creating a chilling effect on the free exchange of knowledge at the school and by depriving them of their academic freedom rights.

At the district court level, the court dismissed the complaint for lack of subject matter jurisdiction. In doing so, the court said that:

> [I]t is legitimate for school officials to develop an opinion about what type of citizens are good citizens, to determine what curriculum and material will best develop good citizens, and to prohibit the use of texts, remove library books, and delete courses from the curriculum as a part of the effort to shape students into good citizens. And there is no way for school officials to make the determinations involved except on the basis of personal moral beliefs. (Citations omitted.) [16]

In addressing the academic freedom issue, the circuit court acknowledged that First Amendment guarantees are sufficiently broad to protect some academic freedom in public schools. However, it found the limits of constitutionally protectable academic freedom to be imprecise, particularly in the secondary school environment.

One aspect of freedom of the classroom recognized by the court is that of a qualified freedom to hear. This concept emerges from *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* [17] which held that where there is a willing speaker, there is a corresponding right to hear that speaker. The argument thus is that secondary school students have a freedom to hear what is in those books. [18]

The court said that two factors limit a secondary student's academic freedom, the first being that a student's right to and need for such freedom is limited by the student's level of intellectual development. The second limitation is that intellectual development is only part of the overall public school's responsibility, which is to encourage and nurture the fundamental social, political, and moral values that permit a student to take his or her place in the community. [19]

As a consequence of the schools board's responsibility for developing community members, the community, through its elected school board, does have a vital and compelling interest in determining what are suitable curriculum materials. In particular, the court said that the structure of the educational system indicates that community mores are to be transmitted through local school boards. The court cited *Epperson* to reinforce its position that it is appropriate for local school boards, through curriculum decisions, to limit complete freedom in the classroom. [20]

Its analysis of *Epperson* is that the Supreme Court approved granting broad discretion to local school boards and approved interfering with that broad grant only if basic constitutional values are directly and sharply implicated. Furthermore, the court specifically found that it is appropriate for community values to be transmitted and for decisions about instructional content to be made on the basis of board members' personal, social, political, and moral views. [21]

The court did say that board discretion is not completely unrestrained. A local board could not flatly prohibit certain topics from being mentioned or discussed in the classroom, nor could it insist on religiously inspired indoctrination. The court would find restrictions of this sort to be of constitutional magnitude justifying judicial review. However, it did not find the allegations in the complaint before it to be of this magnitude.

In reaffirming the district court's decision to dismiss the complaint for lack of subject matter jurisdiction, the circuit court, because of the novelty and importance of the principles involved, granted leave to the plaintiffs to amend their complaint. [22]

What the court seems to be saying in its approach to the issue is that First Amendment rights can, in many instances, be restrained by local board curriculum or material decisions without being subject to judicial review.

The emphasis in *Cary v. Board of Education* [23] is somewhat different. The action here was brought by five high school teachers who asserted their First Amendment rights were violated when the school board banned ten books from the language arts book list.

Pursuant to its textbook selection policy, a board-appointed committee reviewed current and new materials for language arts courses. The committee's review utilized specified criteria: grade level appropriateness, value of material to course objectives, and financial considerations. The school board acted upon the committee's recommendations and approved 1,275 books for use in its language arts classes. It did not approve ten books which the committee had recommended to it, some of which had previously been used in district classes. The board did not state any reasons for failing to approve these ten books. In addition to not approving these books, the board also specifically prohibited using these books as electives, or giving credit for reading them. [24]

The issue presented by the teachers' challenge was the conflict between the school board's powers over curriculum and the teachers' rights to classroom expression. [25]

The teachers' position was that once the courses had been approved by the board, teachers had the right to use non-obscene materials on an elective basis, in their classes. The board's position was that since it had not restricted students from reading the books and did not prohibit teachers from recommending that the books be read (although not for credit), no violation of First Amendment rights had occurred. [26]

In advance of the trial, both parties had stipulated that none of the books were obscene, that there had been no systematic effort to exclude any particular system of thought or philosophy, and that a "constitutionally proper decision-maker" could decide the rejected books were proper for high school language arts classes. [27]

In reaching its decision, the Court of Appeals for the Fifth Circuit stated that since each state could, as Colorado had, freely determine whether or not to provide a public school system, it was appropriate for the local board to be delegated control of instruction within its district. [28] The court found that: "It is legitimate for the curriculum of the school district to reflect the value system and educational emphasis which are the collective will of those whose children are being educated and who are paying the costs." [29]

With this framework, the court determined that the board acted within its rights in omitting the books, even though the decision was a political one influenced by the personal views of its members. [30] The court found that to allow teachers the choice of curriculum material in this instance would be to allow an individual teacher to circumvent the board's properly exercised and delegated discretion regarding curriculum content. [31] Furthermore, since one of the stipulations had been that there was no systematic effort to exclude a particular type of thought or a particular kind of book, the constitutional limitations established in the *Epperson* case had not been transgressed. [32]

It is interesting to note that there were no student plaintiffs in this case so the court did not need to consider any student right to receive information or student academic freedom rights.

Pico v. Board of Education, Island Trees Union Free School District [33] is another interesting case. At the district court level, the court felt precedent bound to the Second Circuit holding in *Presidents Council* and upheld board action removing several books from school libraries.

The school board removed nine books from the elementary and secondary libraries and curricula. Included among the books removed were: *The Fixer, Laughing Boy, Go Ask Alice, Best Short Stories by Negro Writers,* *The Naked Ape, Down These Mean Streets, Soul on Ice, A Hero Ain't Nothing But A Sandwich,* and *Slaughterhouse Five.* An initial statement made by the board indicated that its concern was that these books contained material which was offensive to Christians, Jews, Blacks, Americans in general, and was otherwise "just plain filthy."[34]

The board president later said that his acts were based on his general conservative philosophy and that he felt he had been elected to apply his conservative principles in making board decisions, whether they be fiscal, teacher discipline, or curriculum decisions. He stated that his objections were not based on religious grounds nor did they reflect a desire to favor or exclude one religion over another. His motivation was that he thought the books were in "terrible taste and irrelevant to the educational process in [his] district."[35]

Plaintiffs claimed that the board's actions, based on the above-stated reasons, violated their First Amendment rights.

According to the court, the heart of the controversy is the constitutional role of the board in public school education. "One of the principal functions of public education is indoctrinative, to transmit the basic values of the community."[36]

In considering whether removal of a book already purchased should be reviewed by different criteria than an initial refusal to purchase a book, the court said that the attempted distinction is not grounded in any sound constitutional principle.[37] So long as the board action involved no religious question, either free exercise or establishment, nor a ban on the teaching of any theory or doctrine, it is no more proper for a court to review a board decision to remove a book than it would be to review a board decision not to initially purchase a book.[38]

Nor did the court find a sharp and direct infringement of student First Amendment rights since classroom discussion was not limited nor was a specific student or group the target of the removals.

Rather than see the board action as violative of the First Amendment, the court characterized it as a legitimate restriction of access to certain books that the board believed vulgar. Such activity, while it may reflect a misguided educational philosophy, does not sharply and directly infringe on constitutional rights.[39]

On appeal, the Second Circuit did not see things the same way. In reversing the district court's grant of summary judgment, the circuit court concluded that plaintiffs presented a prima facie case of First Amendment violations. The court stated that it takes more than mere allegations that books have been removed from library shelves, even if the books are controversial and could have been removed to prohibit expression of the ideas they contain, to establish a prima facie case. However, given plaintiff's allegations and what the court characterized as the unusual and irregular intervention into library operation by persons not routinely involved (actions which the court described as erratic, arbitrary, and freewheeling), the court found a prima facie case had been presented.[40]

One particular criticism cited by the court about the procedures for removing the books was, apparently, the lack of standards or criteria to be used. While the court apparently acknowledged the board's authority to remove or regulate vulgar and sexually explicit material, it found the procedures used by the board left it a matter of guesswork for teachers, librarians, and students to know whether other books would be restricted or removed with equally little notice and opportunity for defense. The court said that plaintiffs should at least have a chance to show that the book removals were motivated by unconstitutional rather than constitutional intentions.

Whether or not this case indicates that *Presidents Council* is overruled is unclear. It is possible to reconcile the two cases: if *Presidents Council* is read to say that board discretion, while extremely broad in the text and library book selection areas, is not unlimited, *Pico* could be the example of when those limits might be reached.

The leading case going the opposite way, that is, restricting board authority to remove books from the library because of board members' social or political views, is *Minarcini v. Strongsville City School District*.[41] This Sixth Circuit decision holds that once a local school board voluntarily creates a library and stocks it, it creates a privilege that it cannot condition solely on the social or political tastes of its board members.[42] The Strongsville, Ohio school board had moved to take *Cat's Cradle* and *Catch 22* out of the school library. The board did not state specific reasons, but board minutes indicated that *Cat's Cradle* was written by "the same character who wrote, using the term loosely, *God Bless You Mr. Rosewater*." Other board minutes indicate that the refusal to purchase *God Bless You Mr. Rosewater* was based on the board's assessment that the book was "completely sick."[43]

In its opinion, the Sixth Circuit relied on a statement from *Pickering v. Board of Education*,[44] saying that: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege."[45]

Furthermore, the court recognized a student's First Amendment right to know and to receive information, which it found clearly established by

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. [46]

Contrary to some of the other cases, the court did not think that the board's not having absolutely prohibited discussion of the books or of the topics treated in them saved the board action, as removing the books from the library would greatly hinder student access to them. The burden on the First Amendment freedoms was not "minimized by the availability of the disputed book in sources outside the school. Restraint on expression may not generally be justified by the fact that there may be other times, places, or circumstances available for such expression." [47]

Although this court found that the privileges of a library stocked with certain books could not be withdrawn by succeeding school boards whose tastes might differ from their predecessors, it did permit the board discretion in its initial selection process. At the same time that *Catch 22* and *Cat's Cradle* were removed from the library, the board refused to buy or to approve *God Bless You Mr. Rosewater* and *Catch 22* as texts as well as library books, an action that was contrary to a strong faculty recommendation. [48] This action, too, was challenged on First Amendment grounds.

In analyzing the challenge, the court confirmed the appropriateness of Ohio law which clearly placed discretion for textbook selection with local school boards. It said that this discretion, lodged in a locally elected group, predominated over the professional choices and recommendations of a school faculty and found no constitutional violation in the board's refusing to purchase the disputed books.

This case, compared to those earlier discussed, makes a distinction between initial selection of texts (exercise of board discretion in refusing to purchase books is approved) and the removal of texts once selected (board discretion is restricted), even though the basis for the board's decision not to initially purchase a book is the same rationale as its wanting to remove books already purchased.

This same distinction between a local school board's discretion to order a book removed and its discretion to purchase it initially was presented in a Massachusetts case, *Right to Read Defense Committee of Chelsea v. School Committee of City of Chelsea.* [49] There, *Male and Female Under Eighteen*, an anthology written by adolescents, was objected to by a parent because of the language in one poem. The poem was written by a fifteen-year-old New York City high school student and contained street language in its depiction of the city to a young girl. As soon as the board chairman received the parent's complaint, the chairman took the book and determined that it should be removed from the library because of the "filthy and offensive" language in the poem. He did not review other material in the anthology. [50]

The chairman called a board meeting and distributed copies of the poem to the other three male members but not to the three female members because of the "crude" and "offensive" language it contained. The chairman also was the publisher or editor of a community newspaper and carried his concern to the community through a series of articles and editorials commenting on the book and on the librarian who initially permitted it in the library collection. [51]

The school committee voted to remove the anthology from the school library and was challenged on First Amendment grounds.

In reaching its decision, the court spoke to what it saw as the role of a school and its library:

> The fundamental notion underlying the First Amendment is that citizens, free to speak and hear, will be able to form judgments concerning matters affecting their lives, independent of any governmental suasion or propaganda. Consistent with that noble purpose, a school should be a readily accessible warehouse of ideas.
>
> . . . .
>
> What is at stake here is the right to read and be exposed to controversial thoughts and language -- a valuable right subject to First Amendment protection. [52]

Although it acknowledged that local school committees are the principal policymaking bodies for school administration, including the right to select books, the court stated that there are boundaries on its authority to remove a book from a library, particularly if the removal is because it considers a book's theme and language to be offensive. [53]

Finding that once the school committee purchased a book, it created a constitutionally protected interest, the court said "when First Amendment values are implicated, the local officials removing the book must demonstrate some substantial and legitimate government interest." [54]

In order to remove a book from the school library, the court relied on *Tinker v. Des Moines School District*, [55] and found that it stands for the proposition that an interest comparable to school discipline must be at stake. [56]

> No substantial governmental interest was served by cutting off students' access to *Male and Female* in the library. The defendants acted because they felt *City's* language and theme might have a damaging impact on the [h]igh [s]chool students. But the great weight of expert testimony presented at trial left a clear picture that *City* is a work of at least some value that would have no harmful effect on the students. Defendants' case was premised on the assumption that language offensive to the committee and some parents had no place in the Chelsea educational system. [57]

The court gives little if any weight to local board discretion in determining the content of school libraries once the initial selection of books has been made. The court finds that students' right to know and to read material contained in the school library are predominant and outweigh any interest a local school committee might have in removing a book because of language from the school library.

A third case, *Salvail v. Nashua Board of Education*, [58] follows the holding and reasoning of *Minarcini* and *Right to Read Committee*. In *Salvail*, the issue was the removal of *Ms.* magazine from the library because of parental objection to its advertising and some of its subject matter. The court enjoined the removal of the magazine and said that in order to justify its removal, the board would have to demonstrate a substantial and legitimate government interest in removing it once it had been placed in the library. [59] The court did not find the board's concerns about advertising and subject matter sufficient.

CONCLUSION

The three decisions that have restricted board authority to remove library material have started from a premise that students have a First Amendment right to read that is constitutionally protected and can only be limited upon a showing of a substantial governmental interest to be served by the restraint. Those cases that have permitted school boards wide latitude in removing books have started from a different premise: that board discretion for selection and removal of materials is broad and that it is appropriate for a court to intervene in the exercise of that discretion, even if First Amendment issues are present, only in narrow instances.

However, there is a problem with starting with only one and not both of these premises. The nature of the public school system as we know it is one that encompasses both premises. It is a school board's duty to prescribe curriculum and to select text and library books. In performing its duty a school board is required to make selection on the basis of content, and in so doing, intentionally, deliberately, and correctly chooses to present the students with only a limited portion of the universe of material available. In performing their statutory duties, school boards are required to regulate expression and thus act counter to traditional First Amendment principles. If a public school is thought of in the traditional sense as a public forum, and if its library must serve that purpose, then a local school board would not be able to perform its duties of describing and defining an appropriate educational curriculum for its students. At the same time it performs these duties, though, it must be recognized that a school board cannot transgress constitutional limits or otherwise inappropriately infringe on free speech and expression.

One test, recently suggested by a commentator, would, if used, provide a standard of review sufficiently deferential to the school board to protect community interests and yet also be rigorous enough to protect freedom of expression. This test would be that "reasonable educational judgment" must underlie schoolbook decisions made by school boards.[60]

If this standard were used at the time decisions are made to purchase books, it would mean that a school board's decision to regulate student access to the materials could be based on practical considerations (i.e., finances, subject matter relevancy, etc.) as well as on considerations of political and social values, provided that the decision factors were legitimate educational concerns.

Similarly, when a board went to remove a book, its removal would also need to be based on legitimate educational judgment, especially since it is undoing what would presumably have been a previously appropriate educational judgment.

The commentator suggests that a presumption of appropriateness should attach to a board's initial decision, whether it is to purchase or not to purchase a particular text. Thus, those challenging an initial decision would have the burden of showing that the board's decision was not based on legitimate educational concerns. Likewise, if a board removes a book the burden would be upon the board to show that its removal decision is based on factors significant enough to outweigh the presumption that the initial decision to place the book in the library was educationally appropriate. [61]

The advantage of such a test is that it recognizes the legitimacy of the two competing interests: (1) First Amendment freedoms and (2) school board prerogatives, and provides an articulated standard for determining whether or not First Amendment rights are violated by board action. Without some sort of test, it is unlikely that future court decisions will do much to assist school attorneys in providing answers when they are asked whether or not a board is authorized to refuse to purchase a text or book or whether a board can remove material from a school library.

FOOTNOTES

1 457 F. 2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998, 93 S. Ct. 308 (1972).

2 541 F. 2d 577 (6th Cir. 1976).

3 393 U.S. 97, 89 S. Ct. 266 (1968).

4 *Id.* at 103.

5 *Id.* at 104.

6 *Id.* at 104-105.

7 *Id.* at 111, 113 (Black, J.; concurring).

8 *Id.* at 112 (Black, J.; concurring).

9 *Supra* note 1.

10 *Id.* at 291.

11 *Id.*

12 *Id.*

13 *Id.* at 293.

14 631 F.2d 1300 (7th Cir. 1980).

15 *Id.* at 1302.

16 *Id.* at 1303.

17 425 U.S. 758, 96 S. CT. 1817 (1976).

18 631 F.2d at 1304.

19 *Id.*

20 *Id.* at 1305.

21 *Id.*

22 *Id.* at 1308-09.

23 598 F.2d 535 (10th Cir. 1979).

24 *Id.* at 537.

25 *Id.* at 542.

26 *Id.* at 542-43.

27 *Id.* at 538.

28 *Id.* at 543.

29 *Id.*

30 *Id.* at 544.

31 *Id.*

32 *Id.*

33 474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd*, 49 U.S.L.W. 2274-75 (2d Cir. 1980).

34 *Id.* at 390.

35 *Id.* at 391-92.

36 *Id.* at 396.

37 *Id.* at 397.

38 *Id.*

39 *Id.*

40 ___F.2d___, 49 U.S.L.W 2274 (2d Cir. Oct. 28, 1980) (synopsis).

41 541 F.2d 577 (6th Cir. 1976).

42 *Id.* at 582.

43 *Id.* at 581.

44 391 U.S. 563, 568, 88 S. Ct. 1731 (1968).

45 Minarcini V. Strongsville, 541 F.2d at 582.

46 *Supra*, note 17. In that case, involving pharmaceutical advertising, the Supreme Court held that where a willing speaker exists, the communication is protected both to its source and to its recipient.

47 Minarcini V. Strongsville, 541 F.2d at 582.

48 *Id.* at 579.

49 454 F. Supp. 703 (D. Mass. 1978).

50 *Id.* at 706.

51 *Id.* at 707-09.

52 *Id.* at 710, 714.

53 *Id.* at 711.

54 *Id.* at 713.

55 393 U.S. 503, 89 S. Ct. 733 (1969).

56 Right to Read Defense Committee of Chelsea v. School Committee of City of Chelsea, 454 F. Supp. at 713.

57 *Id.*

58 469 F. Supp. 1269 (D.N.H. 1979).

59 *Id.* at 1274.

60 *Schoolbooks, School Boards, and the Constitution*, 80 Colum. L. Rev. 1092, 1115 (1980).

61 *Id.* at 1117.

ATTORNEY'S FEES AWARDS IN SUITS AGAINST SCHOOL DISTRICTS AND SCHOOL OFFICIALS

By: Tim Cooper

While the availability of damages from school board members, school officials, and school districts for violation of constitutional rights pursuant to lawsuits brought under 42 U.S.C. Section 1983 has been somewhat limited because of the decisions in *Wood v. Strickland* [1] and *Carey v. Piphus*, [2] the availability of an award of attorney's fees pursuant to 42 U.S.C. Section 1988 is of substantial concern to school board members, school officials and school districts. Section 1988 provides that in an action to enforce provisions of various sections of federal law, including 42 U.S.C. Section 1983, "the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." [3]

GENERAL CONSIDERATIONS AND STANDARDS

Because the law gives a court discretion in determining whether to award attorney's fees, the standards upon which a court will base its decision are most important. The express purpose of Section 1988 and the interpretation that has been given to it by the courts have led to a standard which provides for a prevailing plaintiff to normally recover attorney's fees in a case, unless some "special circumstances" of that case render such an award unjust. [4] The burden is on the defendant to make that showing. The courts have not been very clear or consistent in determining what constitutes "special circumstances," but suffice it to say that normally the burden on the defendant is a relatively heavy one. [5]

The award of attorney's fees is to be made to the "prevailing party." To ascertain who is the prevailing party in litigation sounds simple enough: it is whoever "wins" the case. When, however, the case is settled, is not completely resolved in favor of one party or the other, or is otherwise ended without a trial on the merits, the question of who is the prevailing party becomes much more problematic.

Even after a full trial on the merits, a prevailing plaintiff need not prevail on all issues in the litigation. It is enough that the plaintiff obtain some relief or prevail on some issues. [6] However, several courts have held that an attorney's fee award may be reduced in relation to the degree to which the plaintiff does not prevail. [7]

Courts have also held that a final judgment is not required before a plaintiff can seek and recover attorney's fees pursuant to Section 1988. If an interim order in a case has been entered, a court might award attorney's fees if it feels such an award would be just. [8] It should be noted, however, that interim awards are generally granted only after some sort of hearing on the merits or other action, such as settlement. [9] In such instances, and even in cases where a final judgment at the trial level has been entered, the courts often require the party awarded the attorney's fees to file a bond to protect the other party in case of reversal on appeal. [10]

It is also not necessary that a party even obtain a final judgment after a complete trial on the merits. [11] A party may prevail by obtaining a consent decree or other settlement agreement. [12] The award of fees in such a case is not automatic; the court will examine the case to determine if fees should be awarded. [13] A plaintiff may not even have to prevail through a consent decree or settlement, if the plaintiff is found to have acted as a "catalyst" for a change in the practices of the defendant, [14] i.e., the plaintiff, through the institution and pursuit of his or her lawsuit, must have prompted the defendant to correct whatever deficiencies were in existence. The plaintiff must demonstrate that the institution and pursuit of the lawsuit were the motivating factors in the action taken by the defendant. [15] It should also be noted that the recovery of damages is not required to support an award of attorney's fees. Injunctive relief can form the basis for an attorney's fee award. [16]

The great weight of authority also holds that fees may be obtained for the time expended in securing the fees, both at the trial and appellate levels. [17]

The question of when a motion for attorney's fees must be made has arisen in several cases. In *Knighton v. Watkins* [18] and *Bond v.Stanton* [19] it was held that a motion for attorney's fees is not like a motion to alter judgment, which, pursuant to Rule 59(e), Federal Rules of Civil Procedure, must be made within ten (10) days after judgment is entered. The First Circuit in *White v. New Hampshire Department of Employment Security*, [20] however, has taken an opposite view and held that the provisions of Rule 59(e) do control. This issue will likely need to be resolved by the Supreme Court. Since Rule 54, which deals with the award of costs, does not provide a specific time period in which to make a motion for costs, the view enunciated in *Knighton* and *Bond* appears to be the better view.

When an appeal is taken, at least one court has held that, where fees were awarded after judgment on the merits, the notice of appeal must specify that the appellant is also appealing the fee award. The mere appeal of the case on the merits was held to be insufficient to invoke the appellate jurisdiction of the court as to the fee issue. [21]

AWARD OF FEES TO PREVAILING DEFENDANTS

Defendants who are prevailing parties do not fare as well as plaintiffs in seeking an award of attorney's fees, as the courts have imposed a double standard. There is no presumption that a defendant should recover if he or she prevails in a lawsuit.[22] In fact, to be eligible for an award, a defendant must establish either that the plaintiff's action was brought in bad faith or that the plaintiff's action was "unreasonable, frivolous, meritless, or vexatious, or that the plaintiff continued to litigate after it clearly became so.[23] While the Supreme Court has stated that to find "vexatious" conduct by a plaintiff does not require the court to find subjective bad faith by the plaintiff, such a standard severely restricts a defendant's ability to recover attorney's fees.[24]

TYPES OF CASES IN WHICH FEES MAY BE RECOVERED

Because the law states that a party need only prevail to receive an award of attorney's fees, it is presumably possible for a plaintiff to recover such fees even if he or she is entitled to no more than nominal damages under the *Carey v. Piphus* standard.[25] However, at least one court has held that Section 1988 does not include the situation "where there is no injury, and the plaintiff has failed to obtain any relief for either himself, a class or society in general."[26] It must be noted, however, that such a holding may not be generally accepted, and considering the purpose of 42 U.S.C. Section 1988, it is probable that attorney's fees will be available even if plaintiffs can show no actual damages under the *Carey v. Piphus* standard.

When the Supreme Court recently decided the case of *Owen v. City of Independence*,[27] it basically adopted a standard of strict liability for school districts and other governmental bodies. Because municipalities and school districts will not now be entitled to a good faith immunity from suit, the possibility of an award of attorney's fees from school districts has become much greater.[28]

Two other recent Supreme Court cases present further opportunities for plaintiffs to obtain attorney's fees. The case of *New York Gaslight Club v. Carey*,[29] held that a federal cause of action exists to recover attorney's fees for work done in pursuing state administrative remedies in a Title VII case.[30] In *Maine v. Thiboutot*,[31] the court held that a cause of action exists under Section 1983 not only for constitutional violations, but also for violations of other federal statutes. Some courts had previously held that where the plaintiff's cause of action was in reality a state tort claim, fees could properly be denied as not being within the intended purview of Section 1988. However, the continued reliance on such reasoning, in the wake of *Maine v. Thiboutot* and *Maher v. Gagne*, seems less likely.[32] Together, *New York Gaslight Club* and *Thiboutot* open up many possible new avenues for obtaining attorney's fees, as plaintiffs may now attempt to claim fees for work done in administrative hearings required by various federal statutes. In some cases such fees may still not be available pursuant to the specific statutes involved, but there is no doubt that the general availability of fees has been increased.

THE AMOUNT TO BE AWARDED

Reasonable attorney's fees are now regularly awarded in fairly substantial amounts, with most courts following the standards for determining the appropriate amount of the award set out by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.* [33] The hourly rates being awarded in civil rights cases often range from $50 to $150 per hour. [34] Although these amounts continue to escalate, it is still advisable for a plaintiff to seek a "reasonable" attorney's fee, as at least one court has held that an unreasonable or outrageously high request for attorney's fees may be met, under the discretion given to the court, with a total denial of fees. [35]

As previously noted, the standards set out in *Johnson* have been the ones most used in determining a reasonable fee. The legislative history of 42 U.S.C. Section 1988 includes a reference to the case and approves its use. However, not all courts have followed its dictates. The Sixth Circuit, for example, has not followed the *Johnson* standards, at least explicitly. It has taken the position that an "analytical approach," based upon an examination of the number of hours expended multiplied by the hourly rate, will lead to a "reasonable" fee. [36] This base fee may be adjusted upward for unusual time constraints, undesirability of the case, or contingent fee arrangements, or the hours claimed may be decreased for duplication of work. [37] The Second Circuit and the D.C. Circuit have utilized the so-called "lodestar" approach, by which the basic rate is set through multiplying hours by rates. This may then be adjusted up or down depending on the quality of work and other factors. [38] The Second Circuit has also indicated that a contingent fee arrangement may have a bearing on whether to award fees at all or on the fee amount. [39] The reasoning behind such a view is that if a case presents a sufficiently good possibility of a damage award, the "need" for a possible attorney's fee award disappears. The court refused to always apply the *Newman* [40] standard of normally awarding fees without a review of the factors underlying that standard. [41]

When the various methods of determining fees are distilled down, however, there appears to be a greater difference in the manner of stating the standard than in any actual substantive difference in calculation. All the methods rely on some combination of objective and subjective factors to set the final award.

The courts have not agreed as to whether the degree of success should be a major factor in the award of fees, e.g., should the fee award be reduced down in relation to the time spent on unsuccessful issues. The degree of success is clearly one of the standards enunciated in *Johnson*. However, several courts have taken the view that where the issues are inter-related, a reduction need not be made for those issues on which the plaintiff was unsuccessful.[42] On the other hand, many courts have taken the approach of reducing the fees in some proportion to the time spent litigating unsuccessful issues, especially where the issues are discrete or separable.[43]

PROBLEMS WITH ATTORNEY'S FEES AWARDS

Several practical problems, especially for defense counsel, arise because of the availability of attorney's fees. First, the costs of the litigation itself and the possible award of fees become a major focus of Section 1983 cases. For example, the availability of attorney's fees may dissuade defense attorneys from filing various motions or pleadings that they would normally file, because of the possibility of being responsible for the payment of the attorney's fees generated in the preparation of responses to those pleadings.

Second, settlement of cases becomes difficult because of the added factor of the attorney's fees and their amount.

A third area of concern is that the availability of fees serves to encourage litigation in cases in which no damages are likely to be available to the plaintiff. The availability of attorney's fees may cause plaintiffs and especially attorneys to pursue cases where the actual economic value to plaintiff might not otherwise justify such pursuit. Thus, the availability of such fees becomes an artificial stimulus to litigation.

Fourthly, the availability of fees focuses attention upon the winning of the case and the recovery of fees, rather than on the problems which may exist and their resolution.

A fifth problem is that school districts may now be liable to a greater degree for these fees because of the recent decision in *Owen*.

Finally, practical professional problems may arise for administrators who are sued. The payment of a large attorney's fee for an action brought against an administrator will probably not place that administrator in particularly high favor with his or her school board.

While some may feel that the increased availability of fees will not lead to increased emphasis being placed on them by plaintiffs' attorneys, the personal experiences of a number of attorneys in several recent cases indicate otherwise. Several cases are pending in which the main concern seems to be the amount of attorney's fees which might be awarded. While there is no way to eliminate this new factor in the equation of civil rights litigation, there are some new aspects of these cases and certain approaches which should be examined.

Unfortunately, the issue of filing motions, previously mentioned, does become of some concern when considering the possibility of an award of attorney's fees. As with any situation, the merits of the particular case must be examined. If the defense case is strong and likely to prevail, then there is little reason not to pursue vigorously any possible motions, such as motions to dismiss or motions for summary judgment, even if they are not the strongest of motions. Such motions may, in fact, serve to cut short the litigation. If, however, possible defenses are weak and there is a good possibility that the plaintiff will prevail, either after trial or by settlement, then a more judicious look at which motions might be submitted is probably called for. This is not to say that one should not defend cases vigorously. But, in situations where loss in some form is likely, one might want to avoid filing marginal motions in order to avoid paying unnecessary fees. If the plaintiff prevails on the case as a whole, he or she generally will be able to recover fees for the work done in opposing the various motions. Of course, there may be other important reasons to file such motions and those reasons must be weighed in making a decision.

It is also important for defense counsel to realize that many attorneys may be seeking to build their case for attorney's fees from the very outset of the lawsuit. They may seek to enter preliminary agreed orders or even consent decrees on a variety of matters. Later, they will attempt to argue that they have "succeeded" in obtaining these various orders and agreements. If they do not prevail on the merits, such claims for fees should be negated, but it must be remembered that the courts have discretion in this area and can award fees *pendente lite*.[44] The plaintiffs have usually been required to have prevailed in some major or important aspect of the case and usually there must have been a hearing on the merits.[45] However, lawyers' imaginations are fertile, and, as time goes on, it is likely that many new theories of what is a "prevailing party" will be put forth.

One approach in dealing with such preliminary matters might be to insert a paragraph in any agreed order stating that the parties agree that the order, in and of itself, does not confer "prevailing party" status on any party for purposes of attorney's fees. Whether a plaintiff's attorney will agree to such an idea is not certain. It is likely that as the order increases in importance, the likelihood of the other side agreeing to such an arrangement will diminish. It is most unlikely that such language would be agreed to in a settlement agreement or consent decree unless the plaintiff's attorney handled the case on a contingent fee basis and the case involved substantial damages or unless the attorney was being paid from some outside source.

An alternative approach would be to make sure that the settlement agreement (or any other order) contains a specific statement disclaiming the defendant's liability for attorney's fees. Such language will provide at least some basis upon which to argue that the plaintiff has not prevailed.[46] While such an approach may not be wholly successful with respect to a final settlement of a suit, it could prove helpful if the litigation is terminated because of mootness or some other reason.

In trying to settle a case, the amount of fees the plaintiff's attorney is seeking will certainly be a topic of discussion, along with more traditional issues such as the scope of injunctive relief and the amount of damages. If a defendant truly wants to settle a case, or if the attorney feels that settlement is the best course, it is unrealistic to assume that the attorney's fees will not be a major demand of the other side. Ideally, such concerns should not enter into these discussions; realistically, they surely do. Thus, the fees issue becomes one of several issues to be settled in a case, but it is an issue which sits somewhat apart from the others. While the amount is most likely negotiable, the award of fees is not the sort of issue which will be "traded" for another.

Sometimes, however, a case might be settled without an agreement as to either the award of fees or the amount. As noted previously, unless precluded by the settlement agreement or otherwise, a plaintiff's attorney can still recover fees where a case has been settled. While the fees are not automatic, and in some cases they may be avoided, in most cases where there has been a settlement, plaintiffs will be able to recover fees by showing they have improved their position or "prevailed" in some way. [47]

AVENUES AVAILABLE TO CONTEST OR MINIMIZE FEE AWARDS

It must be remembered that if the decision is made to contest the award of fees, the party seeking the award, if successful, is generally entitled to recover amounts expended in seeking the fees. Once again, a decision must be made whether to fight the award or its amount, or whether to seek a settlement based upon a review of the particular case and facts involved.

If the decision is made to contest an award of fees, several approaches may prove fruitful.

I. Argue that the plaintiff has not prevailed; the argument can focus on one of several factors.

    A. The defendant disclaimed liability in any settlement.

    B. After a trial on the merits, the plaintiff did not prevail on a major issue or only prevailed on a minor issue.

    C. The plaintiff did not improve his or her condition in any real sense.

    D. The action taken by the defendant in settling the case was not required by law and was taken gratuitously by the defendant. [48]

E. The defendant's action was not taken in response to the lawsuit.[49]

F. The plaintiff received only nominal damages under the *Carey v. Piphus* standard.

II. Argue that the court's discretion should be used to deny the award of fees.

A. The plaintiff made no efforts to discuss the problems with any school officials prior to bringing suit.[50]

B. The issue in the plaintiff's case is just not very important and the issue could have been resolved in a more productive way.[51]

C. Plaintiff's attorney has engaged in dilatory or other bad faith tactics.

D. Any of the reasons listed in I, above.

III. Ask for a detailed accounting of the fees sought.

A. Ask the court to reduce the fees for out-of-court time.

B. Ask the court to reduce the fees for time spent doing things of a non-legal nature.

C. Ask the court to reduce the fees for travel time.

D. Seek reduction of fees for duplication of efforts by two or more attorneys, especially in pretrial matters.

IV. Seek to attack the award on any of the *Johnson* or other recognized factors.[52]

V. File a motion when appropriate for an award of fees on behalf of the defendant. This will generally be done in cases where the defendants prevail. One should consider specifically alleging that the case is frivolous in the request for attorney's fees in the answer.

CONCLUSION

While these few ideas and thoughts by no means exhaust what has become a major topic and aspect of civil rights litigation, hopefully they will give some insight and general parameters for this relatively new factor. The full extent and implications of Section 1988 are only beginning to be realized, but it can safely be said that the pressures for expansion of recovery opportunities will continue unabated for some time to come.

FOOTNOTES

[1] 420 U.S. 308, 95 S. Ct. 992, *reh. denied*, 421 U.S. 921, 95 S. Ct. 1589 (1975).

[2] 435 U.S. 247, 98 S. Ct. 1042 (1978).

[3] The Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559 (October 19, 1976), amended 42 U.S.C. Section 1988 to provide for the recovery of attorney's fees. The law was passed in response to the Supreme Court's ruling in Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240, 95 S. Ct. 1612 (1975), which severely limited the availability of such fees for the prevailing party. It should be noted that other provisions in federal law provide for the award of attorney's fees, but they will not be considered separately here. The courts have used many of the same standards in all of these cases, especially those brought pursuant to Title VII, 42 U.S.C. Section 2000e *et seq*.

[4] New York Gaslight Club v. Carey, ______ U.S. ______, 100 S. Ct. 2024 (1980); Bond v. Stanton, 630 F.2d 1231 (7th Cir. 1980); Aware Woman's Clinic Inc. v. City of Cocoa Beach, 629 F.2d 1146 (5th Cir. 1980); Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979); S. Rep. No. 94-1011, 94th Cong. 2d Sess. 5 quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S. Ct. 964 (1968).

[5] In International Oceanic Enterprises, Inc. v. Menton, 614 F.2d 502 (5th Cir. 1980), the court held that the plaintiff's ability to pay for an attorney does not constitute "special circumstances" which would properly preclude the award of fees. This view has been quite consistently followed. In Criterion Club of Albany v. Board of Commissioners of Dougherty County, Georgia, 594 F.2d 118 (5th Cir. 1979), the court stated that the fact that the defendants did not admit liability and the fact that little time had elapsed before the case became moot were not "special circumstances" such as to render an award of fees unjust.

[6] United States v. Board of Education of Waterbury, Connecticut, 605 F.2d 573, (2d Cir. 1979); Keyes v. School District No. 1, Denver, Colorado, 439 F. Supp. 393, 399 (D. Colo. 1977) *See also*, 43 A.L.R. Fed. 243 (1979)and 22 A.L.R. Fed. 688 (1975).

[7] Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979); Keyes v. School District No. 1, Denver, Colorado, *supra*. *See also*, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

8 Bradley v. School Board of City of Richmond, 416 U.S. 696, 94 S. Ct. 2006, (1974). The Court held that fees could be awarded after an interim order. This case dealt with 20 U.S.C. Section 1617, but the reasoning should be applicable to Section 1988. *Contra*, Planned Parenthood v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977). (No fees award after preliminary injunction. The court said the case was at an "embryonic stage.") However, in Iranian Students Association v. Edwards, 604 F.2d 352 (5th Cir. 1979), the court awarded fees after the issuance of a preliminary injunction. The court focused on whether the plaintiff had obtained the primary relief sought. *Accord*, Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980).

9 Hanrahan v. Hampton, ______ U.S. ______, 100 S. Ct. 1987 (1980); Kimbrough v. Arkansas Activities Association, 574 F.2d 423 (8th Cir. 1978); Buckton v. NCAA, 436 F. Supp. 1258 (D. Mass. 1977). *But see*, Grubbs v. Butz, 548 F.2d 973 (D.C. Cir. 1976). (No fees awarded where no showing of discrimination had yet been made.) *Accord*, Brown v. Boorstin, 471 F. Supp. 56 (D.D.C. 1978). In Bly v. McLeod, 605 F.2d 134 (4th Cir. 1979), the court held that obtaining a temporary restraining order, without more, would not suffice to adjudge the plaintiff to be declared the prevailing party.

10 Nicodemus v. Chrysler Corporation, 445 F. Supp. 559 (N.D. Ohio 1977); Patterson v. American Tobacco Co., 11 F.E.P. Cases 577 (E.D. Va. 1975).

11 Hanrahan v. Hampton, *supra*; Iranian Students Association v. Sawyer, ______F.2d ______(No. 79-3333, 5th Cir. March 16, 1981). This view has been consistently followed by the courts.

12 Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979); Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). In Doe v. Marshall, *supra*, the court held that fees could be awarded after a case became moot.

13 Maher v. Gagne, _____U.S. _____, 100 S. Ct. 2570 (1980); Hanrahan v. Hampton, *supra*; Bonnes v. Long, *supra*; Nadeau v. Helgemoe, *supra*. The court determined that the plaintiffs had to meet both a factual and legal test to determine if they were the prevailing parties for purposes of an award. The factual test requires a determination of whether the plaintiff's suit was the use of the defendant's taking certain action. That is, did plaintiff's pursuit of the action cause the defendant to change policies or "give" the plaintiff the relief sought. The legal test is whether the

defendant acted gratuitously. That is, if the defendant's action could not be required by law, the plaintiff is not entitled to an award of fees.

While the *Nadeau* standards may not be accepted by every court, they may prove to be potent arguments in any given case. *See*, Young v. Kenley, 465 F. Supp. 1260 (E.D. Va. 1979), adopting the *Nadeau* test and denying fees.

14 NAACP v. Bell, 448 F. Supp. 1164, 1166 (D.D.C. 1978); Keyes v. School District No. 1, Denver, Colorado, *supra*. (The Court discusses the theory, but does not base its holding on it). *But see*, Bly v. McLeod, supra; Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975) (No fees awarded where the plaintiff did not show that the changes in policies made by the defendants were as a result of plaintiff's lawsuit). However, in United States v. Board of Education of Waterbury, Connecticut, *supra*, the court held that an intervenor (a group of community leaders and an education committee), who intervened after the liability phase of the lawsuit, could still recover attorney's fees where the group had successfully opposed several unconstitutional proposals for relief and had helped negotiate an appropriate consent decree.

15 *Supra* note 14. Iranian Students Association v. Sawyer, *supra*; Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977).

16 Miller v. Carson, 563 F.2d 741 (5th Cir. 1977).

17 Bond v. Stanton, 630 F.2d 1231 (7th Cir. 1980). See cases cited in this opinion.

18 616 F.2d 795 (5th Cir. 1980).

19 630 F.2d 1231.

20 629 F.2d 697 (1st Cir. 1980).

21 Terket v. Lund, 623 F.2d 29 (7th Cir. 1980).

22 Hughes v. Rowe, _____U.S._____, 101 S. Ct. 173 (1980) (Case brought under 42 U.S.C. Section 1983); Christianburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 98 S. Ct. 694 (1978) (Case brought under Title VII). Both cases apply the same standard for an award of attorney's fees against plaintiffs.

[23] Christianburg Garment Co. v. Equal Employment Opportunity Commission, *supra*. The bad faith standard is one which has traditionally formed the basis for fee awards in various contexts.

[24] As noted, one of the standards for defendants enunciated by the court in *Christianburg*, bad faith, is the same as that which had governed both parties prior to the 1976 amendment of 42 U.S.C. Section 1988. Thus, a defendant must show the plaintiff acted in bad faith or pursued a frivolous lawsuit, usually a very difficult task.

[25] Carey v. Piphus, *supra*, does not hold officials immune from suit, but rather, requires that a plaintiff prove the amount of his or her damages and rejects a presumption of damage from a constitutional violation. As a practical matter, this standard may make it difficult for a plaintiff to obtain more than a nominal award of damages in many cases. However, even if a plaintiff does not obtain a damage award, if he or she prevails on the issue of liability, an award of attorney's fees should be available.

[26] Miller v. Texas State Board of Barber Examiners, 615 F.2d 650, (5th Cir. 1980).

[27] _____U.S._____, 100 S. Ct. 1398 (1980).

[28] In fact, the possibility of such fee awards being imposed upon school districts is probably greater than against school officials because the officials still are protected by the good-faith immunity standard of Wood v. Strickland, but a district will be held liable for any constitutional violation. Even if no damages are shown under Carey v. Piphus, the district would likely be liable for fees because the plaintiff is still the "prevailing party."

[29] _____U.S._____, 100 S. Ct. 2024 (1980).

[30] While Section 1983 cases are different than Title VII cases, the courts have generally applied similar standards for awards of attorney's fees. Title VII and Section 1988 both provide for awards to "prevailing parties." Thus, New York Gaslight Club will probably be followed in Section 1983 and Section 1988 cases.

[31] _____ U.S. _____, 100 S. Ct. 2502 (1980).

32 In Gibbs. v. Town of Frisco City, 626 F.2d 1218 (5th Cir. 1980), the court held that such arguments were no longer tenable. It is not certain, however, that such arguments cannot still be successfully made in what are clearly state tort cases.

33 488 F.2d 714. The court enunciated several guidelines which must be utlized in determining the reasonableness of an attorney's fee award; 2) the novelty and difficulty of the case; 3) the skill required; 4) the preclusion of other employment; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) the time limitations; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorney; 10) the "undesirability of the case; 11) the nature and length of the relationship with the client; and 12) awards in similar cases. Other courts have followed the *Johnson* approach. King v. Greenblatt, 560 F.2d 1024 (1st Cir. 1976); Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980).

34 Tarver v. City of Houston, C.A. No. 78-H-1487 (S.D. Tex., January 11, 1980); Palmigiano v. Garrahy, 466 F. Supp. 732 (D.R.I. 1979); Cruz v. Beto, 453 F. Supp. 905 (S.D. Tex. 1977).

35 Brown v. Stockler, _____ F.2d _____, No. 78-2503, (2d Cir., January 21, 1980).

36 Northcross v. Board of Education of Memphis, 611 F.2d 624 (6th Cir. 1979).

37 The *Northcross* court noted that most of the Johnson factors are really reflected in the hours expended and hourly rates.

38 Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976); Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1974); Copeland v. Marshall, _____F.2d_____(No. 77-1351, D.C. Cir., October, 1980).

39 Zarcone v. Perry, 581 F.2d 1039 (1978).

40 Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S. Ct. 964 (1968).

41 Buxton v. Patel, 595 F.2d 1182 (9th Cir. 1979), supports the *Zarcone* approach. But the First Circuit, in Sargeant v. Sharp, 579 F.2d 645 (1st Cir. 1978), took a different view and stated that the award of attorney's fees should be awarded without regard to the fee arrangement. The First Circuit did note that the court could reduce the amount of the awards actually going to the attorney.

42 Lamphere v. Brown University, 610 F.2d 46 (1st Cir. 1979); Crain v. City of Mountain Home, Arkansas, 611 F.2d 726 (8th Cir. 1979).

43 Swietlowich v. County of Bucks, 620 F.2d 33 (3d Cir. 1980); Muscare v. Quinn, *supra*; Jones v. Diamond, *supra*; Shaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972).

44 S. Rep. No. 94-1011, 94th Cong. 2d Sess. 5.

45 *See* footnotes 8, 9, *supra*

46 As noted previously, however, the courts have not necessarily looked at whether liability itself is found, but rather, whether the party has obtained at least some portion of what it was seeking.

47 See footnotes, 7-12, *supra*.

48 See footnote, 11, *supra*. Harrington v. Vandalia-Butler Board of Education, 585 F.2d 192 (6th Cir. 1978); Young v. Kenley, *supra*.

49 *See* footnote 12, *supra*. Ackerman v. Board of Education of City of New York, 387 F. Supp. 76 (S.D.N.Y. 1974). *See*, Iranian Students Association v. Sawyer, *supra*.

50 Naprstek v. City of Norwich, 433 F. Supp. 1369 (N.D.N.Y. 1977).

51 Naprstek v. City of Norwich, *supra*. Martin v. Hancock, 466 F. Supp. 454 (D. Minn. 1979).

52 The appellate courts have generally required that the district courts articulate the reasons behind an award of fees, i.e., the district court must make findings utilizing the *Johnson* standards.

THE EDUCATION OF HANDICAPPED CHILDREN:
RECENT DEVELOPMENTS IN PUBLIC LAW 94-142

By: John W. Bowen

INTRODUCTION

It would be useful -- but almost certainly impossible -- to cover all of the significant state agency decisions, Office of Civil Rights and Office of Special Education rulings and policy letters that have come out in the past year dealing with the education of handicapped children. Instead, this article will review some of the recent federal court decisions dealing with this subject area.

Before proceeding with the cases, however, it is necessary to note that all the regulations adopted under Section 504 and P.L. 94-142 were recodified and redesignated because of the establishment of the Department of Education. The regulations under Section 504 were transferred from 45 CFR Part 84 to 34 CFR Part 104 effective May 9, 1980. P.L. 94-142 regulations were transferred from 45 CFR Part 121a to 34 CFR Part 300 effective November 21, 1980.

RELATED SERVICES

Under the Education for All Handicapped Children Act of 1975, [1] a handicapped child is entitled to a free, appropriate public education consisting of special education and related services designed to meet the special needs of the handicapped child. The regulations define related services as including:

> transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counselling services, and medical services for diagnostic and evaluation purposes. The term also includes school health services, social work services in the school, and parent counselling and training. [2]

Recently, school districts have had to confront changing interpretations on how far the courts will go in including certain services within the classification of related services to which a handicapped child may be entitled. The case of *Tatro v. Texas* [3] provides a useful model to examine the nature of this problem.

Amber Tatro is a four-year-old child with spina bifida, causing her to suffer from both orthopedic and speech handicaps, along with a neurogenic bladder. Because of the neurogenic bladder, Amber cannot empty her bladder voluntarily and has to be catheterized every three or four hours to avoid developing chronic and possibly fatal kidney infection. The school district developed an Individualized Education Program (IEP) that was satisfactory to the parents in all respects but one. It failed to provide for the Clean Intermittent Catheterization (CIC) to be administered to Amber during the school day.

Amber's challenge to the school system's denial of the CIC in the federal district court was unsuccessful. [4] The court, although sympathizing with her plight, concluded that the CIC was not a related service in the statutory sense because it did not arise from the effort to educate. The court pointed out that:

> ...[t]here is a difference between maintenance of life systems and enhancing a handicapped person's ability to learn. The CIC is essential to Amber's life, but once that life maintenance service is provided, it is unrelated to her learning skills. [5]
>
> Plaintiffs cannot convert a statute prohibiting discrimination in certain governmental programs to a statute requiring, in essence, the setting up of governmental health care for people seeking to participate in such programs. [6]

However, in an opinion issued on September 2, 1980, the Fifth Circuit Court of Appeals reversed the district court and ruled that the school system was obligated to provide Clean Intermittent Catheterization as one of the related services to which the child was entitled. [7] The court reasoned that Amber was entitled to a free, appropriate public education which should be provided in the regular classroom to the maximum extent possible. [8] To accomplish this in Amber's case, it is necessary to provide catheterization while she is at school. Ergo, the catheterization is a "supportive service" that is required to assist a handicapped child to benefit from special education. [9]

Following the *Tatro* decision, the Department of Education on January 19, 1981, published a policy interpretation defining catheterization as a related service when it is required in order to provide a free, appropriate public education in the least restrictive environment.[10] However, the effective date of the interpretation was twice postponed by the Reagan administration, first to March 30, then to May 10.[11] On May 8, the operative date of the interpretation was indefinitely postponed by the Department.[12]

Another approach to the question of what services a school must provide is found in the Second Circuit. The court, in *Rowley v. Board of Education of Hendrick Hudson Central School District,*[13] emphasized the interpretation of the term "appropriate education" rather than "related services." Affirming the district court decision in *Rowley,* the appellate court held that requiring the school district to furnish a deaf child with the services of a sign language interpreter in the classroom was part of the free, appropriate public education to which the child was entitled.[14] The district court interpretation of what the legislation and regulation intended by the term "appropriate education" had stated that:

> '[A]n appropriate education' could mean an 'adequate' education -- that is, an education substantial enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma. An 'appropriate education' could also mean one which enables the handicapped child to achieve his or her full potential.[15]

However, the court rejected both extremes in favor of a position described as being "between" the two extremes, and requiring that "each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children to achieve their full potential."[16] The court did acknowledge that some problems might arise in the application of its standard:

> The difficulty with the standard, of course, is that it depends on a number of different measurements that are difficult to make. It requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by nonhandicapped children.[17]

Although the district court set forth its standard for an appropriate education and the circuit court affirmed it, neither appeared to have actually applied it. Instead, they seemed to be swayed by a finding of fact by the district court that without a sign language interpreter, only 59% of what transpired in the classroom was accessible to the deaf child, while 100% would be accessible to her with a sign language interpreter. [18] The district court also pointed out that there was expert testimony that every deaf child fares better in class with an interpreter and concluded that the child's academic education would be "more appropriate" with than without an interpreter. [19]

The actual standard, then, appears to be that if a service will provide a better education to the handicapped child than would be the case without the service, then the school system should have to provide the service -- not the test enunciated by the court of comparing ratios of potential to actual performance.

To forestall worries about the decision being widely cited against other school districts, the Second Circuit specifically ruled that their decision was restricted to the unique facts of the *Rowley* case and that the decision could not be cited as authority in any other case. [20] Nevertheless, state and local educational agencies have filed a petition for certiorari with the United States Supreme Court. [21]

In examining this issue, the decision in *Camenisch v. University of Texas* [22] is worth noting. That case involved the question of whether or not an educational agency was required to provide a sign language interpreter for a deaf student at the post-secondary education level. The Fifth Circuit there affirmed the district court's ruling requiring the University of Texas to procure and pay for a qualified interpreter for a deaf student under the provisions of Section 504 of the Rehabilitation Act of 1973. In doing so, the court distinguished the Supreme Court decision in *Southeastern Community College v. Davis*, [23] by pointing out that unlike Davis, a deaf person seeking admission to a nursing program, Camenisch was a fully qualified individual in that he could perform well in his profession in spite of his handicap. All he needed was the education and training that would allow him to continue.

RESIDENTIAL PLACEMENT

Closely associated with the concept of related services is the question of residential placement. The Handicapped Act regulations require that "if placement in a public or private residential program is necessary to provide special education and related services to the handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child." [24]

It might appear from this that before a school system would be obligated to pay for all of the costs of a residential placement, three determinations should have to be made: first, that the child is handicapped and therefore entitled to special education and related services; second, that the child is in need of some type of residential placement; and finally, that the special education and related services cannot be provided without the residential placement.

Instead, courts appear to be ordering school districts to provide residential placement if the need for such placement merely arises out of the handicap, as opposed to being necessary for educational purposes. [25]

In *North v. District of Columbia Board of Education*, [26] a severely handicapped sixteen-year-old boy was determined by the school system's placement committee to be in need of a residential placement in order to receive a free appropriate public education. The school system found such a placement after being ordered to do so by a hearing officer.

However, problems developed and the placement became unavailable. The parents requested that the school system provide emergency residential placement until some other appropriate placement was found. The school system refused, contending that plaintiff's problems were emotional, social, and otherwise noneducational and that the school system should not be required to provide living arrangements that were not strictly of an educational nature. [27]

Possibly because the school system's own placement committee originally recommended the residential placement as being required or possibly because the school system had suggested that neglect proceedings be initiated against the parents if they did not provide for their child, the district court refused to attempt to separate the social, emotional, medical, and educational problems to determine which one required the residential placement. Instead, the court assigned sole responsibility for the residential placement to the school board. [28]

The *North* decision was cited with approval by the district of Delaware in the case of *Kruelle v. Biggs*. [29] The *Kruelle* case, however, differed from *North* in that the school system had never recommended the residential placement, as was originally done in *North*. The school system had developed appropriate services and treatments in the IEP, a fact the parents did not dispute. The parents simply were claiming that their son required a residential placement as part of the IEP. The court stated the issue as "not whether (the current placement) is adequate for what it offers, but whether Paul (Kruelle) requires more continuous care than that available in a six-hour school day in order to learn." [30]

Although the court appropriately framed the issue in terms of whether or not the residential placement was required in order for the child to learn, the decision apparently was based upon the testimony of a doctor of osteopathy, who had not testified at the original hearing. This doctor, who was also the child psychiatrist consulted by the parents, had testified that what Paul needed was "an around-the-clock placement with programming by people who know how to do it in order to maximize Paul's chances of learning." [31] (Emphasis added.) "Maximizing chances" to learn was a standard ostensibly rejected although actually followed in the *Rowley* case. [32] But the court here ruled that it was "evident that Paul will realize his learning potential only if he receives more professional help than the Meadowwood School's day program can offer him." [33]

It is important to note that sympathy may have played a part in these decisions. For example, in the *Kruelle* case, not only did the child have extremely severe emotional and physical problems, but he was also being represented by his parents. [34] This sympathy factor is real and can be difficult to overcome. [35]

What happens when the residential placement is ordered and the school system does not have the money to fund the placement? In *Hines v. Pitt County Board of Education*, [36] the court pointed out that state and local school officials had suggested that they could not afford the up to $1,850.00 per month tuition that might be required to implement a residential placement. But because the state had volunteered to participate in the Handicapped Act program, the court found it had to comply with the requirements. If there was a money shortage, the burden could not be allowed to fall on one single child or group of children, but should be spread equally to all children in the system. [37]

DISCIPLINE

One area that generates much interest and concern is the discipline of handicapped students. What should be done with a handicapped student who commits an act of misconduct, which, if committed by a non-handicapped student, would result in expulsion?

In *Doe v. Koger*, [38] an Indiana district court ruled that the Handicapped Act did not prohibit expulsions of handicapped children in general, but rather, "only prohibits the expulsion of handicapped children who are disruptive because of their handicap." [39] The court ruled that the change in placement procedures of the Handicapped Act should be utilized to determine whether or not the handicap is the cause of the child's propensity to disrupt. [40] Unfortunately, though, the court did not stop there. Seemingly unknowingly, the court shifted from determining whether or not the handicap is a cause of the misconduct to requiring that a determination be made as to whether the student's misconduct was a result of an inappropriate placement, saying that "when a handicapped child is involved, expulsion must not be pursued until after it has been determined that the handicapped child has been appropriately placed." [41]

In *Stuart v. Nappi* and *S-1 v. Turlington*, federal district courts for Connecticut and Florida, respectively, have ruled that expulsions of handicapped students must be treated as a change in placement and must be accomplished by following the change in placement procedures outlined under the Act and its regulations and keeping in mind the requirement of the least restrictive environment. [42] The Fifth Circuit Court of Appeals has affirmed the district court's ruling in *S-1 v. Turlington*. [43]

The *S-1* case involved seven educable mentally retarded children who were expelled from school for separate unrelated acts of misconduct. The acts included threats to teachers and other students, vandalism and sexual misconduct in class. All of these expelled students were afforded the procedural protections required by *Goss v. Lopez*. [44]

In only one case did a student raise his handicap as a defense in the expulsion proceedings. [45] Based upon the testimony presented to them, the school board made a determination in the discipline hearing that S-1 knew and understood the rules, understood the consequences of violating the rules and had handicaps which were not behavioral in nature. They concluded that S-1's handicap of being mentally retarded was not the cause of his misconduct.

In its opinion, the Fifth Circuit pointed out that the district court had refused to determine whether a handicapped student can ever be expelled. [46] The appellate court refused to dodge the question because of the "gray areas" that might result if the question were left unanswered and held that "expulsion is still a proper disciplinary tool under the EHA and Section 504 when proper procedures are utilized and under proper circumstances."[47]

What then, are the proper circumstances under which a handicapped child may be expelled? The school district in S-1 argued that expulsion of a handicapped child would be appropriate where the handicap was not a behavioral handicap or where the child possessed sufficient intelligence to understand rules and comply with them. For example, if a child is seriously emotionally disturbed, then the child's misconduct might very well be a manifestation of the handicap itself. To expel the child under those circumstances would be punishing the child for the child's handicap. Also, it would not be appropriate to expel a child who was profoundly retarded and did not have the ability to understand rules and whose compliance or noncompliance with such rules would be a random occurrence as opposed to an intentional act. [48]

On the other hand, if the handicapped child was simply orthopedically impaired, mildly mentally retarded, visually impaired, hearing impaired, speech impaired or simply had a specific learning disability, then there would be no reason why such a child could not comply with the rules just as any other child. If such a handicapped child committed an act which, if done by a nonhandicapped child, would result in the expulsion of that child, then expulsion would also be appropriate for the handicapped child. The school district argued that the fact of being handicapped does not exempt or immunize the handicapped child from the normal discipline procedures of the school except in the two circumstances already mentioned.[49]

The Fifth Circuit, in rejecting the school district's position, relied in part on the testimony of a clinical psychologist testifying on behalf of plaintiffs. The psychologist had testified at the hearing that:

> a connection between the misconduct upon which the expulsions were based and the plaintiff's handicap may have existed...a child with a low intellectual function and perhaps the lessening of control would respond to stress or respond to a threat in the only way they feel adequate, which may be verbal agressive behavior. [50]

The court also noted the psychologist's example of an orthopedically impaired child who would provoke fights notwithstanding the fact that he is likely to lose. She indicated that would be his way of dealing with stress and feelings of physical vulnerability, and in that sense the misconduct was connected to the handicap. [51]

Apparently, the proper circumstances where expulsion would be available with respect to a handicapped child would be when it is determined that the student's misconduct does not bear a relationship to his handicapping condition. This determination cannot be made by the school board but must be made by a trained and knowledgeable group of persons. [52] But it would seem that to rule out expulsion, all the child really needs is a psychologist that will testify that the child may have been frustrated because of the handicapping condition, and that this might have caused him to act inappropriately in a stressful situation.

If a connection is established, then expulsion of a handicapped student would not be appropriate. On the other hand, if there is no connection between the handicapping condition and a given misconduct, then expulsion would be appropriate following the proper procedures. Because the court specifically ruled that expulsion is a change in educational placement, proper procedures would be the change in placement procedures found under the act and its regulations, not the *Goss v.*

Lopez due process procedures for discipline in ordinary situations. In other words, there is a dual discipline system for expulsion depending upon whether the child is handicapped or not. The court said that "unlike any other disruptive child, before a disruptive handicapped child can be expelled, it must be determined whether the handicap is the cause of the child's propensity to disrupt. This issue must be determined through the change of placement procedures required by the handicapped act." [53]

The fact of this dual discipline system is even more readily apparent in light of the Fifth Circuit's final clarifying statement with respect to expulsion of handicapped students. Although the court ruled that expulsion was still a proper disciplinary tool for a handicapped student under proper circumstances and following proper procedures, the court also stated that it could not "authorize the complete cessation of educational services during an expulsion period." [54] A student, through his or her own misconduct, can lose the right to receive educational services, just as a student might lose any other valuable right, including liberty, as a result of misconduct. But the Handicapped Act seems to have created a right that can never be lost. Apparently, the court is saying that a handicapped student can be expelled so long as you do not really expel him.

The effect of this ruling is still unclear. For example, what is a school's responsibility when, for appropriate cause, it decides to expel a student that it has no reason to believe is handicapped, but the student subsequently asserts that the misconduct in question is the result of an undiagnosed handicap? Need the school comply with S-1 or can it follow its normal expulsion process? In Florida, within one week of the Fifth Circuit's decision, a sixteen-year-old eleventh grade student stabbed another student during a fight over a boyfriend on a school bus. The school board had started expulsion procedures when the attorney who had represented S-1 appeared with a copy of the Fifth Circuit opinion. Although the student had never been classified as handicapped, the attorney contended that the student might have an undiagnosed learning disability and if so, it would not be appropriate to expel the student. The school board had no choice but to agree to postpone the expulsion decision pending the outcome of the testing evaluation.

The position taken in S-1 is in agreement with the position suggested by the Department of Education in December of 1980 on what process is due under Section 504 when it becomes necessary to expel a student who is handicapped. [55] The Department's position is that in expelling a handicapped child, a determination must first be made on whether there is a relationship between a student's misconduct and the student's handicap. The Department is presently deciding whether or not to issue a regulation dealing with this subject.

TESTING BIAS

Another area of concern is charges of testing bias. In *Larry P. v. Riles* [56] plaintiffs were black students who claimed that the IQ tests used by defendant were biased and that defendant discriminated against blacks by using them. They alleged that the tests resulted in the misplacement of black children in special classes for the educable mentally retarded. [57] In reaching its decision, the court accepted expert testimony concerning the discriminatory nature of certain IQ tests.

However, in *Parents in Action on Special Education (PASE) v. Hannon,* [58] the court did not want to listen to statistics concerning the impact of the testing, but rather, wanted to review each and every question on the challenged test to determine which ones were in fact discriminatory and how. [59] During this process, the court found that many of the attorneys and experts involved had not even read the questions. [60] After reviewing all of the questions, they found that only nine of them should not be used because of bias. [61]

The court also rejected plaintiffs' claim that the school district must prove that the tests are not biased, ruling instead that the school system only needs to show that the total process used was free of bias. [62]

YEAR-ROUND SCHOOL

In 1979, the District Court for the Eastern District of Pennsylvania ruled in *Armstrong v. Kline* [63] that a Pennsylvania blanket prohibition against educational programs for the handicapped extending beyond the normal 180-day school year violated the Handicapped Act. The Court of Appeals for the Third Circuit has upheld the district court's determination, [64] although it should be emphasized that this case does not require that all mentally retarded children be provided with year-round school, but simply that there not be a prohibition against it in case an individual child is determined to be in need of such year-round school. On June 22, 1981, the Supreme Court denied a motion for certiorari in the case. [65]

OUTLOOK FOR THE FUTURE

As handicapped children and their parents become more and more aware of their rights and the possibilities that they have for services under the act and regulations, litigation on the subject is likely to increase. Handicapped litigation will likely become the glamour litigation of the '80s just as race was in the early '60s and sex was during the '70s. It has been said that other legislation, such as collective bargaining or administrative procedures acts, are lawyers' "relief bills" or a "Full Employment for Lawyers Act"; the Education of the Handicapped Act and its regulations may represent a "Lawyers' Tenure Act."

On the political front, much talk will probably center on block grants coming to the states without strings attached. Though the current administration is seeking to do away with P.L. 94-142, [66] lobbying efforts by various groups may result in preservation of parts of it.

Finally, if funds are cut back with no relief from the requirements and possibly even if funds are not cut back, there may be a push for states to bail out from under the Act, deciding that it costs more to comply with than the state receives in funds. However, if a state did not have Education of the Handicapped Act funds but still received some federal funds, it would still have to comply with the requirements of Section 504 regulations which, although they essentially require the same thing that P.L. 94-142 regulations require, differ in some aspects, e.g., due process and related services. At the present time, New Mexico is the only state that has not applied for 94-142 funds. However, the state is currently involved in litigation brought under Section 504. [67] If New Mexico succeeds and comes out of the suit with fewer requirements, then other states might seriously begin considering this option.

FOOTNOTES

1 20 U.S.C. Section 1401, *et seq.*

2 34 C.F.R. Section 300.13 (1980).

3 481 F. Supp. 1224 (N.D. Tex. 1979), *rev'd*, 625 F.2d 557 (Fifth Cir. 1980).

4 481 F. Supp. 1224. Suit was brought under 20 U.S.C. Section 1415(e)(2).

5 *Id*. at 1227.

6 *Id*. at 1229.

7 625 F.2d 557.

8 *Id*. at 563.

9 *Id*. at 563-64.

10 46 Fed. Reg. 4912 (1981).

11 46 Fed. Reg. 12495; 46 Fed. Reg. 18975.

12 46 Fed. Reg. 25614.

13 483 F. Supp. 528 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 945 (2d Cir. 1980). The school district has petitioned the Court for a writ of certiorari.

14 632 F.2d 945.

15 483 F. Supp. at 534.

16 *Id*.

17 *Id*.

18 *Id*. at 532.

19 *Id*. at 535-6.

20 632 F.2d at 948.

21 Dec. 15, 1980 (Docket #80-1002).

22 616 F.2d 127 (Fifth Cir. 1980), vacated and remanded on other grounds, _____U.S._____, 49 U.S.L.W. 4468 (April 29, 1981).

23 442 U.S. 397, 99 S. Ct. 2361 (1979), cited at 616 F.2d at 132.

24 34 C.F.R. Section 300.302.

25 *See*, North v. District of Columbia Board of Education, 471 F. Supp. 136 (D.D.C. 1979); Kruelle v. Biggs, 489 F. Supp. 169 (D. Del. 1980).

26 471 F. Supp. 136.

27 *Id*. at 140.

28 *Id*. at 142.

29 489 F. Supp. at 173.

30 *Id*. at 172.

31 *Id*. at 173.

32 *See* notes 15-19, *supra*.

33 489 F. Supp. at 173-74.

34 Paul had been described as a profoundly retarded child whose physical development was further complicated by cerebral palsy. At age 12, he could not walk, dress himself, or eat unaided...was not toilet trained...did not speak, and his receptive communication level was extremely low. In addition to his physical problems, he had a history of emotional problems which resulted in choking and self-induced vomiting when experiencing stress.

35 For example, in *North*, the court felt it would not serve the child's best interests to institute neglect proceedings against his parents, who refused to accept him after he was discharged from his original placement. 471 F. Supp. at 138, 140.

36 497 F. Supp. 403 (E.D.N.C. 1980).

37 *Id.* at 408. See also Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866, 876 (D.D.C. 1972).

38 480 F. Supp. 225 (N.D. Ind. 1979).

39 *Id.* at 229.

40 *Id.*

41 *Id.*

42 *See*, Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978) and S-1 v. Turlington, 3 EHLR 551: 211 (S.D. Fla. 1979), aff'd, 635 F.2d 342 (Fifth Cir. 1981).

43 635 F.2d 342 (Fifth Cir. 1981).

44 419 U.S. 565, 95 S. Ct. 729 (1975), cited at 635 F.2d at 344.

45 *Id.* at 344. Except for S-1, the students were not given, nor did they request, hearings to determine whether their misconduct was a manifestation of their handicap.

46 *Id.* at 348.

47 *Id.*

48 *Id.* at 346.

49 *Id.*

50 *Id.* at 347.

51 *Id.*

52 *Id.* at 350.

53 *Id.* at 348, citing Doe v. Krueger, 480 F. Supp. at 229.

54 *Id.* at 348.

55 45 Fed. Reg. 85082, 85083.

56 495 F. Supp. 926 (N.D. Cal. 1979).

57 *Id.* at 931.

58 506 F. Supp. 831 (N.D. Ill. 1980).

59 *Id.* at 837.

60 *Id.*

61 *Id.* at 875.

62 *Id.* at 880.

63 476 F. Supp. 583 (E.D. Pa. 1979). *aff'd*, 629 F.2d 269 (3d Cir. 1980).

64 629 F.2d 269.

65 49 U.S.L.W. 3949

66 S.1103, introduced by Sen. Hatch on May 4, 1981 and H.R. 3645, introduced by Representative Erlenborn on May 20, 1981.

67 New Mexico Association for Retarded Citizens v. New Mexico, 495 F. Supp. 391 (D.N.M. 1980), appeal filed by the state August 15, 1980 (10th Cir.) (No. 80-1876).

RELIGION IN THE SCHOOLS

By: Charles E. Wade

INTRODUCTION

The separation of church and state mandated by the establishment clause of the First Amendment to the United States Constitution [1] has proved an enduring topic for controversy. A prime target of the controversy, the field of public education continues to foster litigation on the role of religion in the school system. The courts apparently have found that while moral instruction is a necessary element in public education, [2] the teaching of religion is a separate and impermissible subject of instruction. [3] Yet none of those courts has yet provided an adequate distinction between morality and religion sufficient to enable the schools to establish uniform guidelines as to areas of permissible conduct.

At the outset, it should be clear that the line of demarcation between permissible government involvement and actual entanglement is a fine one and is not readily perceivable, perhaps due to its faceted nature. While the ideal of a strict separation of church and state seemed easily attainable, the goal set in motion became impracticable. For instance, in certain cases labeled the "parochiaid" cases, a complete denial of funds to private sectarian schools would comport with the establishment clause of the First Amendment, but would run afoul of the free exercise clause. In effect, the government would be denying aid to the children attending sectarian schools on the basis of their religion; in other words, prohibiting the free exercise of their religion. [4] On the flip side, providing such aid across the board would amount to an establishment of religion contra to the first phrase of the amendment. [5] Consequently, the Supreme Court chose to leave the decision of whether or not to use public funds to aid private schools to the individual states and has usually upheld the states' interpretations of their own constitutions on the issue of funding to private schools, unless such interpretations amount to overt discriminatory practices or actively promote religious programs or instruction. [6]

HISTORICAL OVERVIEW

The struggle with the intangible concepts of religion and secularism has been slow to resolve itself. Accordingly, to achieve a perspective of where the courts are headed in the area of religion, schools and the First Amendment, it seems practical to begin with an overview of where they have been.

As one might expect, prior to passage of the Fourteenth Amendment, the Supreme Court insisted that the First Amendment applied to the federal government but not to the states and refused to hear state cases involving free exercise of religion. [7] However, even with the advent of the Fourteenth Amendment, it took over three-quarters of a century for the courts, in *Cantwell v. Connecticut*, to finally hold the First Amendment applicable to the states by virtue of the Fourteenth:

> The fundamental concept of liberty embodied in that amendment (the Fourteenth) embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. [8]

Since the decision in *Cantwell*, the courts have been confronted with a plethora of cases involving religion and schools. These cases can be separated into five subject areas: 1) dismissal or release from classes for religious purposes; 2) public school leasing of sectarian owned buildings for educational purposes; 3) religious instruction in public universities; 4) Bible distribution in the schools; and 5) school prayer.

THE "RELEASE TIME" CASES

"Release time" cases tackle the issue of whether or not the allowance of specified time periods for voluntary religious study is constitutionally permissible. Two prominent cases in the area merit attention: *McCollum v. Board of Education of Champaign, Ill.*, [9] and *Zorach v. Clauson*. [10] *McCollum* centered upon a religious education program administered in the public schools of Illinois. Students not wishing to participate were excused and went to the study hall during the time in which the religious instruction occurred. In holding the program unconstitutional, the Court voiced concern that the policy of requiring non-believers or those of non-represented faiths to leave the room if they did not wish to participate in the programs could lead to harassment of such individuals by those remaining in the class, apparently assuming that non-participants would be largely outnumbered by participants, and would thus tend to stand out from the balance of the student body. Such harassment, or the possibility thereof, might cause students who would not normally desire to participate in the program to remain in the room so as to avoid calling attention to themselves.[11]

Additionally, the Court recognized that whether or not the program would actually inhibit the actions of non-participating students, the implementation of a program specifically designed to encourage religious awareness violated the establishment clause of the First Amendment by promoting religion.[12] The fact that the time devoted to the religious teaching was paid for with public funds was also evidence that governmental entanglement with religion was present.[13]

Four years later, the Supreme Court faced substantially the same issue in *Zorach*[14] but upheld the program on what seems little more than a "grasping at straws" approach. While in *McCollum* the program called for religious instruction at the school, the *Zorach* program involved instruction during school hours at designated religious facilities. Parental consent slips were required from those students who participated in the programs, and non-participants were required to remain at school and continue their regular course of study. The Court in *Zorach* distinguished the case from *McCollum* on the grounds that school premises were used to facilitate the religious study in the latter case, while non-school funds or facilities were employed in the former.[15] The Court avoided the issue of harassment it had concerned itself with in *McCollum*, and approved the program in *Zorach*.[16]

The decisions which have followed *Zorach* have arrived at similar results, leaving the impression that released-time programs (where religious instruction is given at the school) are impermissible, but dismissed-time programs (students leave the school for religious instruction at designated religious facilities) are consistent with the First Amendment limits on governmental involvement in religion.[17]

PUBLIC SCHOOLS IN CHURCH-RELATED BUILDINGS

Lower courts have applied the reasoning of the Supreme Court in *Zorach* by analogy to other areas, including the use of sectarian-based buildings for public educational facilities. The results seem to suggest that, so long as secular ideals and goals are pursued and religion is neither advocated nor supported overtly by the public school system, there is nothing in the Constitution which prohibits carrying on public education in a building owned by a religious group merely because of the religious character of the landlord.

In *Hartington School District v. Nebraska Board of Education*,[18] the Nebraska Supreme Court arrived at precisely that decision. Holding that no excessive entanglement existed insofar as public school authorities retained strict control over the curriculum and the instruction did not include sectarian aspects but continued on a secular basis, the Nebraska court determined that leasing classrooms for public school use in a religious school building was not unconstitutional per se.[19] On a motion to the United States Supreme Court, certification was denied.

A more recent case involving the issue of public schools in religious buildings arose in 1980 in Michigan. In *Americans United for Separation of Church and State v. Porter*,[20] a dual enrollment system operated in a Catholic school building offered public school courses to anyone wishing to attend. The Catholic school operated alongside the public school and offered different courses than the public school. However, the only students to attend the public section were the same students who attended the Catholic section of the school, since the Catholic portion by itself did not offer a complete high school program.

While noting that the dual enrollment program met the secular purpose requirement set out by the Supreme Court in *Lemon v. Kurtzman*,[21] e.g., the need to avoid overcrowding in the schools,[22] the court proceeded to condemn the practice, relying on the Supreme Court's decision in *Committee for Public Education v. Nyquist*,[23] to the effect that "even a very significant benefit to the state will not save a program which still has a 'primary effect' of advancing religion."[24] The *Porter* court premised its decision on the fact that the Catholic portion of the school was in danger of closing down until the public portion was opened, and the public funding that accompanied the opening of public classes in part of the school enabled the entire school to remain open.[25] In addition, the effect of using the public funds in a manner that prolonged the functioning of the religious portion of the school was held to constitute excessive entanglement and thus violated First Amendment precepts.[26]

While *Hartington* and *Porter* are difficult, if not impossible, to reconcile, it is important to note that *Hartington* has not been struck down by the Supreme Court and that *Porter* is an opinion at the district court level and may still go through several appeals. The cleanest analysis to be drawn from the cases tends to suggest that use of religious buildings for public school purposes is not unconstitutional per se, as long as 1) there is no intermingling of religion and education, and 2) the public facet maintains strict administrative and instructional independence from the religious lessor.

UNIVERSITY RELIGION CASES

The third category of cases merits mention only because of the characterization of state supported universities as public institutions. Two areas are particularly noteworthy in this group: first, whether teaching the Bible as literature is constitutionally permissible; and second, whether a public university prohibiting religious worship and teaching in its buildings is consistent with the First Amendment.

The first issue was considered by the Washington Supreme Court in *Calvary Bible Presbyterian Church v. Board of Regents of the University of Washington.* [27] The court there held that the Bible was an acceptable piece of literature for instructional purposes when offered in an objective manner, as indicated by the use of critical works directed at the literary features of the Bible. The crucial (and perhaps saving) aspect of the case was its emphasis on objectivity.[28] The court stated that:

> There can be no doubt that constitutional bars are absolute against religious instruction... but they do not proscribe open, free, critical and scholarly examination of the ...experiences ...of mankind. [The course] was taught in a completely objective manner, had no effect on religious beliefs, was not slanted toward any particular theological or religious point of view, did not indoctrinate anyone, did not enter into the realm of faith or belief, and was not taught from a religious point of view. [29]

Without that objectivity, it is entirely possible that the Bible course would have fallen under the taboos of the First Amendment.

Another "university" case, *Chess v. Widmar,* [30] involved the invalidation of a university regulation which prohibited religious worship or instruction to be conducted in the college's buildings or on its campus. The university had taken the position that "...prohibiting religious worship or religious teaching in its buildings or on its grounds is constitutionally required to avoid an establishment of religion." [31] Present policy had the effect of inhibiting religion, since the policy works to "single out and stigmatize certain religious activity and consequently, discredits religious groups." [32] It will be interesting to see how the Supreme Court handles this case, which was granted certiorari in April, 1981. [33]

Vast differences do exist between public universities and the public school system, and their aims may render them inappropriate subjects for comparison. Practices which may necessarily be fitting in university procedure may not be appropriate in the public school system. Accordingly, no attempt can really be made to link the university decisions to those decisions concerned solely with the elementary and secondary levels of education. The preceding cases discussing university trends are included merely to insure a rounded picture of the various areas of decision concerned with public education as a whole.

BIBLE DISTRIBUTION

Certain topics in the public schools arena have undergone intensive scrutiny, but few have been litigated as exhaustively as the issue of Bible reading or teaching. At one time, Gideon Bibles were distributed freely among the public schools, especially in the elementary grades. Any child desiring a copy received one free of charge. With tightening controls, it became necessary to present parental request slips in order to obtain the Bibles. Despite the requirement of parental consent, courts across the nation began to veto distribution of these Bibles on the ground that it was not acceptable to all religious sects and allowing distribution created an inference that the schools preferred one religion over another, contrary to the Constitution.[34] As recently as 1977, the Fifth Circuit, in *Meltzer v. Board of Public Instruction of Orange County, Florida*, declared that any form of distribution of Gideon Bibles to public school students violates the First Amendment.[35]

BIBLE READINGS AND SCHOOL PRAYER

The distribution of Bibles is not the only practice prone to attack -- the practice of reading Bible excerpts has also drawn some fire. For years many elementary school children began their morning exercises by having a Bible verse read by the teacher or a member of the class. Across the nation state courts had upheld this tradition, especially where the Bible readings were taken from the Old Testament, on the theory that the readings were nonsectarian.[36] Some school boards even formulated policies requiring Bible verses to be read at the opening of each school day and often dictated specific verses by emphasizing the moral virtues to be gained through the readings and by forbidding commentary on the verses read. But in 1963 the momentous decision in *School District of Abington Township v. Schempp* outlawed the practice of devotional Bible reading and school sponsored prayers.[37] Speaking for the court, Justice Clark rationalized the strict measures adopted, stating that:

> It is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent, and, in the words of

> Madison, 'it is proper to take alarm at the first experiment on our liberties.' [38]

Closely interwoven with the Bible reading cases is the single most famous group of cases in the history of the religion in public schools dilemma -- the school prayer cases. One of the first and most significant decisions in this group was a landmark case, *Engel v. Vitale*, handed down by the Supreme Court in 1962, [39] in which certain state officials in New York composed a brief, nondenominational prayer for use in public classrooms. Adopted by the Union Free School District upon recommendation of the State Board of Regents, it was directed that the prayer be read aloud in class at the beginning of each day. The substance of the prayer was as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." [40] While students were not obligated to join in the prayer, parents of several pupils objected to recitation of the prayer on constitutional grounds. The lower courts upheld the policy because the schools did not compel any pupil to join in the prayer over parental objection. On review, however, the Supreme Court found the prayer to be an undeniably religious activity, reasoning that:

> the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayer for any group of the American people to recite as a part of a religious program carried on by government. [41]

The uproar that accompanied the *Engel* decision touched off a mad flurry of amendments, modifications, deletions, and reconstructions as schools attempted to insulate themselves from a feared onslaught of litigation. Most of the cases that struggled upwards through the hierarchy to the Supreme Court were denied certiorari and summarily dismissed or reversed with the Court usually making some reference to *Engel* and *Schempp*. [42] For example, in *DeSpain v. DeKalb County Community School District*, [43] the defendants justified the prayer on the grounds that the word "God" was not included in the verse. Defendants also contended that the children did not bow their heads or otherwise assume a reverential attitude during recitation of the verse. Nevertheless, the Supreme Court refused to disturb the Seventh Circuit's finding that the verse constituted a prayer, and thus violated the First Amendment's Establishment Clause.

A different approach can be seen in *State Board of Education v. Netcong*. [44] In that case, certain prayers were chosen from the Congressional Record and read in voluntary prayer sessions in the school building prior to commencement of each school day, with time allotted by the school for the sessions paid for by public funding and endorsed by the school. As a result, the New Jersey Supreme Court found the prayer sessions an unconstitutional infringement of the First Amendment. Again, the United States Supreme Court refused to hear the appeal, apparently continuing to rely on the holdings in *Engel* and *Schempp* as conclusive on the issue of prayer in the public schools.

More recently, an appeal was taken from a Second Circuit Court of Appeals decision having facts substantially similar to those of the *Netcong* case. In *Brandon v. Board of Education* [45] a student group wanted to conduct prayer meetings in the classrooms before the school day began. The school, however, refused to permit the meetings. The district court agreed with the school's position and dismissed a complaint brought by the students. The Second Circuit affirmed that decision, and the students have now petitioned for a writ of certiorari.[46]

Judging from its past actions with respect to prayer issues, the Court can be expected to deny a hearing on the issue, reaffirming its position in *Engel* and *Schempp*. *Brandon* may also have significant undercurrents not present in earlier decisions. Conceivably, if the school permits (or would permit) other groups or clubs an opportunity to utilize the classrooms for meetings, either before or after school hours, then there is apparently little justification for denying the prayer group an equal opportunity. If students are denied access to the classrooms for extracurricular meeting purposes on an across-the board basis, however, this argument is unlikely to receive much consideration.

Finally, two cases out of Massachusetts may help to illustrate the fine line between permissable and impermissable activity. In *Gaines v. Anderson*, [47] a state statute required that a one-minute period of silence be observed at the opening of each school day for purposes of "meditation or prayer." [48] The statute was challenged as a religious exercise, but the district court held that a secular purpose was served by the statute, not a sectarian one, finding it "entirely consistent with the secular goals of public schools for the state to encourage students to turn their minds silently toward serious thoughts and values."[49] But in 1980 the statute again came up for review due to a change in wording -- a 1980 amendment caused the statute to read "At the commencement of the first class of each day...a period of prayer may be offered...and during any such period an excusal provision will be allowed for those students who do not wish to participate."[50] The unamended statute had provided merely for a period of silence, which all students were required to observe, the purpose of which was meditation or prayer. The amended statute was quickly struck down by the Supreme Judicial Court of Massachusetts as an unconstitutional establishment of religion by the state,[51] the effect of the amendment having been to put the Massachusetts statute on the same footing as the balance of the school prayer cases.

RECENT CASES

In the preceding analysis, two recent cases were omitted and reserved for a more in-depth comparison because of the connotations to be drawn from them with respect to the present position of the courts on the religion/education issue. These cases are *Florey v. Sioux Falls School District*[52] and *Stone v. Graham*.[53]

Florey involved a policy statement and set of rules formulated by a citizens' committee and adopted by the School Board of Sioux Falls, South Dakota. The policy statement required that no religious belief or non-belief be promoted or disparaged by the school district or its employees, and encouraged mutual respect, toleration and appreciation for the various religious views held among the students, their parents, and the staff. It also specified that students and staff should be excused from participating in any practices contrary to their own religious beliefs. The rules provided for observance of various holidays having a religious and secular basis and permitted use of music, art, drama, literature and symbols as aids to portraying the overall cultural and heritage aspects of the holidays, limited by the requirement that all such aids be presented in an objective manner.[54]

Plaintiffs brought suit against the school district alleging that the rules and policy statement violated the establishment and free exercise clauses of the First Amendment. The district court held that proper administration and narrow construction of the new rules would not contravene the Constitution.[55]

On appeal, the Eighth Circuit Court of Appeals went a step further and declared that "the public schools are not required to delete from the curriculum all materials that may offend any religious sensibility,"[56] but made it clear that a major consideration was the fact that, at the time of the decision below, no holiday season had passed with the rules in effect, so little evidence of actual implementation of the rules had been presented. The finding was thus limited to the constitutionality of the rules and policy statement on their face, with the court stating that "the constitutionality of any particular school activity conducted pursuant to the rules in association with any particular holiday cannot be determined unless and until there is a specific challenge, supported by evidence, to the school district's implementation of the rules."[57]

While *Florey* was denied certiorari by the Supreme Court,[58] *Stone v. Graham* did achieve actual review by the Court, resulting in a reversal of the Kentucky Supreme Court's decision.[59] A Kentucky statute requiring a copy of the Ten Commandments to be posted in each public classroom was challenged as being violative of the establishment and free exercise clauses of the First Amendment. The statute called for the copies to be funded solely through voluntary contributions and delineated the purpose of the display: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."

Both the trial court and the Supreme Court of Kentucky upheld the statute on the basis of its "avowed purpose." The U.S. Supreme Court, however, noted that a "...legislative recitation of a supposed secular purpose" was not sufficient to avoid the First Amendment ban.[60] The salient feature of the majority opinion concerned the predominantly religious nature of the Ten Commandments. Insofar as the common law of the United States and the legal code of Western Civilization contain no references to religious duties of believers in God, the portion of the Commandments with respect to at least those duties are without secular basis, and the overall effect is not educational, but theistic. This bane is intensified by the legislative origin of the directive requiring posting, for while posting on the wall of an individual classroom as part of an ongoing study of historical and cultural bases for the Constitution and legal systems conceivably might not incur such uproar, especially if the posting were of a temporary nature, the statutory mandate here constitutes a sanction by government of a primarily religious activity.[61] The United States District Court of North Dakota made the same determination in *Ring v. Grand Forks Public School District No. 1* on virtually the same facts.[62]

As was earlier noted, the courts are far from finding a simple solution for dealing with the education/religion dichotomy. In *Florey* and *Stone*, the members of the courts were unable to agree even among themselves as to the proper bounds of permissibility, resulting in split decisions as to both cases. *Florey* split the circuit court on a two to one vote, while *Stone v. Graham* divided the nation's highest court five to four, the Chief Justice aligning with the dissenting faction (ostensibly on the ground that he would give plenary consideration to the case). Justice Rehnquist voiced his dissent by criticizing the majority for its summary condemnation of a statute having both legislative and judicial review to support it.

Despite the obvious dissension among the judiciary, *Florey* and *Stone* are reconcilable on several grounds. First, the policy statement and rules held permissible in *Florey* were drawn up by a citizens' committee composed of the school district's music director, Jewish, Catholic and Protestant clergy, an attorney, a member of the American Civil Liberties Union, and parents and teachers in the district. The rules were not designed to require any sort of religious exercise in the schools, but merely to provide a framework of permissible activities available to individual schools and teachers who wish to include certain programs in the curriculum to "enhance their overall instructional plan." [63] *Stone*, on the other hand, involved a statute which mandated posting of religious materials in all public classrooms of the state, albeit containing a secular purpose "message" at the bottom. No choice was available to either students or faculty in respect to the posting. Secondly, the Court of Appeals in *Florey* provided for the observance of a variety of holidays having both a religious and secular basis, inferring that holidays with a solely religious basis would be taboo. In addition, the holidays specifically included as acceptable for observation were not restricted to Christian or Jewish holidays, but included those having more diverse origins, such as St. Patrick's Day and Halloween.

In *Stone*, however, the literature in question was purely of Christian and Jewish origin. It is at least conceivable that the statute would not have been quite so objectionable if it had required posting of all comparable "rules" in the major identifiable religious sects in the world with concepts equivalent to U.S. common law foundations. Such a statute might still be struck down as contravening the First Amendment by "advancing...religion," unless perhaps, it were worded so as to permit postings of religious materials but require that equal attention be given to various religious cultures and sects around the world in order to present an objective overall picture. For example, the Ten Commandments are mirrored by certain rules emanating from the faith of the Hindu religion and also by certain dictates of Buddhism. Since America is often classified a "melting pot," it is doubtful that Christianity and Judaism were the sole bases for the development of the common law in the United States. Consequently, a broad overview of the various religions with respect to their contributions to the common law system would be less likely to cause objections. Along these same lines, it is foreseeable that the South Dakota judiciary might have to reconsider their decision in *Florey* if the rules and policy statement therein are used as a springboard to promoting a particular aspect of religion to the exclusion of others (e.g., observance of only Christian holidays, or even Christianity-based holidays).

As a final note, the traditional three-part test for determining whether a particular activity or statute is permissible under the establishment clause as developed by the Supreme Court in *Lemon v. Kurtzman*, [64] was applied in both *Florey* and *Stone*. The Court in Stone concluded that the Kentucky statute requiring posting of the Ten Commandments in public schoolrooms had no secular legislative purpose and was thus unconstitutional, though the same test, applied by the lower courts in *Stone*, resulted in a finding that the avowed secular purpose was sufficient to avoid the Constitutional proscription.

In *Florey*, however, the Eighth Circuit concluded that the rules neither advanced nor inhibited religion and did serve a secular purpose -- "the advancement of the students' knowledge of society's cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama that is likely to be of interest to the students and their audience." [65] But the key factor in *Florey* was a presumption that in the future all programs would be presented with an air of objectivity. The lack of objectivity in *Stone* brought on the disapprobation of the majority:

> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like...if the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the school children to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause. [66]

CONCLUSION

Over the years since the Bill of Rights first came into existence, the courts have taken significant steps with respect to the freedom and liberty so coveted by Americans and protected by the Constitution. From the standpoint of many religious advocates, these steps are indicative of hostility toward religion or prayer. But as Justice Black, speaking for the court in *Engel v. Vitale*, admonished,

> Nothing, of course, could be more wrong.... Men of faith in the power of prayer...led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here....They knew rather that (the First Amendment) was written

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> to quiet well justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to that God that government wanted them to pray to.[67]

Consequently, while the courts may profess the need for moral instruction in the schools, they temper that sentiment with the stipulation that any religion entering the picture must be taught on a thoroughly objective basis. The overall effect of the decisions is to delineate two primary concepts: first, that the government must maintain a neutral position with respect to religion as a whole -- being neither *for* religion nor *against* it, but merely acting as an unbiased administrator of the laws with respect to all citizens; and second, that religion may be a subject for instruction in the public schools, but only to the extent it is presented objectively and not as a profession of faith or advancement of doctrine. To maintain neutrality, government apparently cannot legislate any provision for or against prayers in public schools, though it seems it may allow periods for "meditation" or "meditation *or* prayer." Additionally, while government may not prevent religious groups from exercising the same privileges exercised by other non-religious groups merely on the basis of their religious status, it need not allow religious groups any special privileges on the basis of that status. Finally, it appears that government may allow the furtherance of educational objectives by permitting objective instruction with respect to religious themes, stories, literature or ideals, so long as the instruction is presented in a detached manner and without preference for any one religion over another, or over no religion at all.

While the foregoing precepts are vague and subject to misinterpretation, they are precisely where the courts have left the state of the law today. But to the extent that the First Amendment deals with abstract principles, the rules developed to enforce and define those principles are often similarly abstract of necessity. For the most part, the Supreme Court has taken the position that its past decisions are final in these areas, and, with the exception of unusual questions such as the type presented in *Stone*, consistently refuses to hear appeals on cases where the law is settled. As a result, the outcome of future cases will be predictable on the basis of the decisions in the earlier Supreme Court cases, and, unless there is a major turnover on the Court, giving rise to minority viewpoints, the state of the law in the area of religion and education can be expected to remain relatively static.

FOOTNOTES

1 U.S. Const. Amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

2 *See*, James v. Board of Education, 461 F.2d 566, 573 (2d Cir.) *cert. denied*, 409 U.S. 1042, 93 S. Ct. 529 (1972) ("A principle function of all elementary and secondary education is indoctrinative -- whether it be to teach the ABC's...or to transmit the basic values of the community").

3 *See*, Abington School District v. Schempp, 374 U.S. 203, 83 S. Ct. 1560 (1963) (finding that a daily scripture reading program in the school was in violation of the establishment clause, and rejecting contentions by the state that the object of the program was...the expounding of moral values.

4 *See*, Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504 (1947); Board of Education v. Allen, 392 U.S. 236, 88 S. Ct. 1923 (1968).

5 *See*, Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2135 (1971).

6 McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461 (1948).

7 Permoli v. New Orleans, 3 How. 588 (1845).

8 310 U.S. 296, 303-4, 60 S. Ct. 900, 903 (1940).

9 333 U.S. 203, 68 S. Ct. 461.

10 343 U.S. 306, 72 S. Ct. 679 (1952).

11 333 U.S. at 227, 68 S. Ct. at 473 (separate opinion).

12 *Id*. at 209-10, 68 S. Ct. at 464-5.

13 *Id*.

14 343 U.S. 306, 72 S. Ct. 679.

15 *Id*. at 309, 72 S. Ct. at 681.

16 *Id.* at 310, 72 S. Ct. at 682.

17 *See, for example,* King v. Rockingham Council of Week-Day Religious Education, 523 F.2d 121 (4th Cir. 1975).

18 188 Neb. 1, 195 N.W.2d 161, *cert. denied,* 409 U.S. 921 (1972).

19 *Id.* at 3.

20 485 F. Supp. 432 (W.D. Mich. 1980).

21 403 U.S. 602, 91 S. Ct. 2105 (1975).

22 485 F. Supp. at 435.

23 413 U.S. 756, 93 S. Ct. 2955 (1974).

24 485 F. Supp. at 436, *citing* Committee for Public Education, 413 U.S. at 783, 93 S. Ct. at 2970.

25 485 F. Supp. at 437

26 *Id.* at 445.

27 72 Wash. 2d 912, 436 P.2d 189, *cert. denied,* 393 U.S. 960 (1968).

28 *Id.* at 979.

29 *Id.* at 919.

30 635 F.2d. 1310 (8th Cir. 1980), *cert. granted,* _______U.S. ______, 101 S. Ct. 1345 (1981).

31 635 F.2d at 1316.

32 *Id.* at 1317.

33 _____U.S. _____, 101 S. Ct. 1345 (1981).

34 *See, e.g.,* Tudor v. Board of Education, 14 N.J. 31, 100 A.2d 857, *cert. denied,* 348 U.S. 816, 75 S. Ct. 25 (1954).

35 Meltzer v. Board of Public Instruction of Orange County, 548 F.2d 559 (5th Cir. 1977).

36 *See,* Doremus v. Board of Education of Hawthorne, 5 N.J. 435, 75 A.2d 880, *cert. denied,* 342 U.S. 429, 72 S. Ct. 394 (1952).

37 374 U.S. 203, 83 S. Ct. 1560 (1963).

38 *Id.* at 205, 83 S. Ct. 1573

39 370 U.S. 421, 82 S. Ct. 1261 (1962).

40 *Id.* at 422, 82 S. Ct. at 1262.

41 *Id.* at 425, 82 S. Ct. at 1264.

42 *See, e.g.,* Chamberlin v. Dade County, 160 S.2d 97, *rev'd,* 377 U.S. 402, 84 S. Ct. 1272, where the Court, citing *Schempp,* summarily reversed the lower court decision which had allowed regular recitation of the Lord's Prayer and other religious activities. *See, also,* Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965), *cert. denied,* 382 U.S. 957, 86 S. Ct. 435 (1965) where the Court let stand the appellate court ruling that freedom of religion does not include the right to student initiated prayers in the public schools.

43 384 F.2d 836 (7th Cir. 1967) *cert. denied,* 390 U.S. 906, 88 S. Ct. 815 (1968).

44 *57 N.J. 172, 270 A.2d 412, cert. denied,* 401 U.S. 1013, 91 S. Ct. 1253 (1971).

45 _____F.2d_____, 49 U.S.L.W. 2354 (2d Cir., Nov. 17, 1980).

46 Petition for certiorari filed 2/17/81 (No. 80-1396).

47 421 F. Supp. 337 (D. Mass. 1976).

48 *Id.* at 339.

49 *Id.* at 342.

50 Mass. Gen. Laws Ann. ch. 71, section 1A (West), as inserted by St. 1979, c. 692.

51 Kent v. Commissioner of Education, ______Mass, ______, 402 N.E.2d 1340 (1980).

52 619 F.2d 1311 (8th Cir.), *cert. denied,* _____U.S._____, 101 S. Ct. 409 (1980).

53 ______U.S. ______, 101 S. Ct. 192 (1980).

54 619 F.2d at 1314.

55 464 F. Supp. 911 (D.S.D. 1979).

56 619 F.2d. at 1318.

57 *Id.* at 1319.

58 ______U.S. ______, 101 S. Ct. 409 (1980).

59 Enact. Acts 1978, ch. 436 section 1 (effective June 17, 1978); K.R.S. 158.178 (1980).

60 ______U.S. at ______, 101 S. Ct. at 194.

61 *Id.*

62 483 F. Supp. 272 (D.N.D. 1980).

63 619 F.2d at 1315.

64 403 U.S. 602, 91 S. Ct. 2135. The statute or activity must have a secular purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion.

65 619 F.2d at 1314.

66 _____U.S. _____, 101 S. Ct. at 194.

67 370 U.S. at 434-35, 82 S. Ct. at 1269.

SEX AND THE SCHOOLS:

SEXUAL HARASSMENT, MISCONDUCT, AND RELATED ISSUES

By: R. Dean Jollay, Jr.

INTRODUCTION:

SEXUAL HARASSMENT AND MISCONDUCT IN GENERAL

"Sexual harassment" is a term which was unknown or unfamiliar to most people but a short decade ago. Broadly defined, sexual harassment refers to the imposition of sexual requirements in the context of the employment relationship. The harassment may be verbal or physical. It may range from suggestion and innuendo to indecent propositions and forced sexual relations. A typical case usually involves a supervisor's unwanted sexual advance, the employee's rejection of that advance, and a subsequent retaliation by the supervisor for the rejection. [1]

What constitutes actionable sexual harassment is a subject which defies precise legal analysis. One might ask:

> Where is the line between a sexual advance and a friendly gesture? How actively must the issue be forced? If a woman (or man) complies, should the legal consequences be different than if she (he) refuses? Given the attendant risks, how explicitly must a woman (or man) reject? Might quitting be treated the same as firing under certain circumstances? To get legal relief, must a job benefit be shown to be merited independent of a sexual bargain, or is the situation an injury in itself? When a perpetrator insists that a series of touchings were not meant to be sexual, but the victim experienced them as unambiguously sexual, assuming both are equally credible, whose interpretation controls when the victim's employment status is damaged? [2]

Other questions concerning a board of education's responsibility for sexual harassment abound: Should a board of education be vicariously responsible for unknown acts of its employees in violation of a stated policy against sexual harassment? To what extent should a school board be expected to oversee the off-campus activities of its employees? Where does an employee's right to associate with the opposite sex end and a board of education's duty to protect its workforce from sexual harassment or misconduct begin?

A school's apparent duty to protect its employees from sexual harassment under the Equal Employment Opportunity Commission's *Final Interpretative Guidelines on Sexual Harassment*, issued on November 10, 1980, [3] may run headlong into an employee's asserted right to have a private social relationship with another employee. For example, in *Schreffler v. Board*, [4] a former junior high school principal won a total of $190,500 in compensatory and punitive damages from a school board which allegedly non-renewed his contract because of its displeasure with his relationship with the assistant principal, whom he later married. The jury found the defendant board had violated the principal's right to privacy and that the violation played a substantial role in the board's decision not to re-employ him. Likewise, in *Johnson v. San Jacinto Junior College*, [5] a junior college registrar won back pay after being demoted to teacher because of his extramarital affair with a school librarian.

While particular sexual misconduct may be prohibited by statute, more frequently the question presented to the school lawyer is whether such misconduct falls within one of the broad grounds for discharge or suspension, such as "immorality." There seems to be no judicial consensus as to where to draw the line between a teacher's purely out-of-school conduct and that conduct which has a direct and immediate effect on the school environment. As a general proposition:

> [A]lthough the private association of a teacher with a member of the opposite sex might otherwise be considered private conduct beyond the scope of [legitimate] concern of school officials, it ceases to be such if the conduct directly affects the performance of his professional responsibilities, or if, without contribution on the part of school officials, the conduct has become the subject of such public notoriety as significantly and reasonably to impair the capability of the particular teacher to discharge the responsibilities of his position. . . .[6]

As one might expect, courts have been more consistent in upholding the dismissal of a teacher for employee-initiated sexual acts with a student.[7]

Other problems plague a board of education which attempts to take disciplinary action against an employee accused of sexual harassment or misconduct. Claims of sexual misconduct will often create a great deal of hostility and bitterness among staff. Parents are likely to become aware of rumors circulating in the community. These parents will attempt to pressure the board of education to "do something." If the board does indeed "do something," its actions are rife with potential libel and slander actions. Consider *Jacox v. Memphis City Board of Education,*[8] in which a teacher brought a libel action for the school board's publication of charges against him in connection with his dismissal. The charges were filed following complaints by female students that the teacher had put his hands on their breasts and buttocks. The court there held that the state's tort liability act precluded such suits.[9] A different result, however, could certainly be obtained in a state where boards of education do not enjoy sovereign immunity.

Within the school itself, a supervisor's retaliation for an employee's rejection of unwanted sexual advances can take many forms: termination or nonrenewal of employment, assignment of a teaching employee to additional student supervision, denial of promotions from teaching to administrative positions, reprimands and/or negative evaluations, denial of opportunities for professional growth, or assignment of the employee to substandard physical working conditions. Retaliation by employees against students who reject unwanted sexual activity can take the form of unwarranted or excessive discipline or academic punishment.[10] There may be no retaliation at all, rather, the teacher, administrator or employee may simply attempt to take advantage of his or her position of authority.

SEXUAL HARASSMENT AS EMPLOYMENT DISCRIMINATION UNDER TITLE VII

Various theories have been advanced to support employee claims of sexual harassment. In *Clark v. World Airways, Inc.* a jury awarded $2,500 in compensatory damages and $50,000 in punitive damages (and determined the employer could be vicariously liable) in a tort action for sexual assault but rejected claims based upon extortion, interference with contract, and Title VII.[11] In *Kyriazi v. Western Electric Co.*, the court found a basis for recovery predicated on Title VII and under a state law for tortious interference with plaintiff's contract of employment.[12] In *Seritis v. Lane*, two former waitresses were awarded $275,000 in damages from a union local which the court determined had breached its duty of fair representation when the union's secretary-treasurer solicited them to engage in prostitution and pornographic entertainment.[13] Cases of sexual harassment have also been brought as a contract action[14] and for unemployment compensation insurance.[15]

However, it appears that the majority of successful lawsuits for sexual harassment have been brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.* It is under Title VII that school boards appear to have their greatest exposure to employee claims, for the Act has been judicially expanded to the point where there is now little doubt that work-related sexual harassment which results in the loss of job benefits constitutes sex discrimination.[16]

Title VII is comprehensive in its prohibition against employment discrimination. Section 703(a) of Title VII, 42 U.S.C. Section 2000(3)(e)-2(a) states that it is unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[17]

Nonetheless, sexual harassment appears to have been beyond the contemplation of Title VII's original authors. Congress did not discuss sexual harassment prior to its enactment of Title VII.[18] No provisions relating to sexual harassment were included in Title VII. Likewise, the amendment of the 1964 Act by the Equal Employment Opportunity Act of 1972, while producing considerable discussion on the general topic of sex discrimination, did not result in any specific provision concerning sexual harassment, nor did the Equal Employment Opportunity Commission's Final Guidelines on Sex Discrimination prohibit sexual harassment.[19]

The mid and late 1970s produced an increased awareness of problems relating to sexual harassment in the workplace. One survey in two upstate New York cities, for example, found that 70% of women between the ages of 19 to 61 interviewed had been sexually harassed at some time in their working careers. Seventy-five percent of the victims reported that sexual advances continued even when ignored. Of the 185 who complained to their employers, half found that nothing was done about the problem.[20]

EARLY DECISIONS

Early court decisions reflect reluctance to read sexual harassment into Title VII. In the 1975 case of *Corne v. Bausch & Lomb, Inc.*,[21] an employer was held not to be responsible for the sexual advances of a supervisor since those acts "had no relationship to the nature of employment."[22] Plaintiffs had alleged that the conduct of the supervisor made working conditions so intolerable they were forced to resign. However, the district court held that they had failed to state a claim under Title VII. The supervisor was merely satisfying a personal urge and no employer policy was involved.

In another early case, *Williams v. Saxbe*,[23] the district court determined that while a supervisor's sexual advances might be a violation of Title VII, a factual determination would have to be made to ascertain whether the supervisor's conduct amounted to "a policy or practice of imposing a condition of sexual submission on the female employees or whether this was a non-employment related personal encounter."[24] In *Miller v. Bank of America*,[25] the district court likewise held Title VII applied only to employment discrimination and not to individual acts of discrimination. Thus, the court reasoned, individual acts of sexual harassment by one employee against another do not constitute a cause of action against the employer. The defendant employer maintained a policy of prohibiting immoral misconduct, including sexual advances, and of disciplining employees who made sexual advances to other employees. The court found that plaintiff could not show the employer's tacit approval since she had failed to make a complaint to her employer.[26]

However, the Ninth Circuit reversed the district court in Miller,[27] rejecting the employer's argument that it should not be liable for the sexual advances of its supervisors when it had established a policy against such misconduct. The court noted that Title VII's definition of "employer" included any agent of the employer. Bank of America could thus be held liable for any Title VII violation of an agent acting in an authorized capacity as a supervisor.[28] The doctrine of *respondeat superior* does apply "where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy."[29] (Emphasis added).

RECENT VIEWS

Though more courts now seem to be holding that sexual harassment amounts to a violation of the sex discrimination provisions of Title VII, no court has yet gone quite as far as the Ninth Circuit in *Miller* in imposing strict liability on the employer, although three other circuit courts have determined that sexual harassment of subordinates by supervisors is a violation of Title VII when it impacts on a subordinate's job.[30] In each of these cases, the United States courts of appeals have reversed district court decisions holding that plaintiffs failed to state a cause of action under Title VII.[31]

Barnes v. Costle,[32] from the D.C. Circuit, suggests that job abolishment cannot be the result of a female employee's rejection of her supervisor's sexual advances. In *Barnes*, plaintiff filed a Title VII action alleging that her job had been abolished because she resisted her supervisor's sexual advances. Plaintiff had been employed as an administrative assistant to the director of equal employment opportunity for the Environmental Protection Agency. The district court had rejected her claim, reasoning that she was discriminated against because she failed to have an affair -- not because she was a woman.

In reversing the lower court, the court of appeals reasoned that the director's conditioning plaintiff's employment on her submission to sexual relations was not a demand he would have made to any male employee. The court also pointed out that gender need not be the sole factor contributing to discrimination to make out a Title VII claim and stated that "it is clear that the statutory embargo on sex discrimination in employment is not confined to differentials founded wholly upon an employee's gender. On the contrary, it is enough that gender is a factor contributing to the discrimination in a substantial way."[33] The plaintif in *Barnes* "became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job."[34] The court compared the situation in *Barnes* to *Phillips v. Martin-Marietta Corporation*,[35] in which the Supreme Court held that a company's refusal of employment to mothers but not to fathers of pre-school age children was prima facie sex discrimination within the meaning of Title VII, although women who did not have pre-school children were not excluded. Since gender was a criterion in the determination of employability, a prima facie violation of Title VII was shown.

In *Tomkins v. Public Service Electric and Gas Co.*,[36] the Third Circuit emphasized the need to distinguish between sexual advances which are purely personal and those that are job-related. Plaintiff, a secretary, had been invited to lunch by her supervisor purportedly to discuss her work. While at lunch, the supervisor made sexual advances to her. When plaintiff refused her supervisor's advance, she was threatened with physical force and with recrimination against her in her employment. In analyzing earlier cases the court said:

> The courts have distinguished between complaints alleging sexual advances of an individual or personal nature and those alleging direct employment consequences flowing from the advances, finding Title VII violations in the latter category. This distinction recognizes two elements necessary to find a violation of Title VII: first, that a term or condition of employment has been imposed and second, that it has been imposed by the employer, either directly or vicariously, in a sexually discriminatory fashion. Applying these requirements to the present complaint, we conclude that Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status -- evaluation, continued employment, promotion, or other aspects of career development -- on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.[37] (Emphasis added).

The court concluded that the supervisor's demand was indeed job-related because it amounted to a condition of employment.[38]

The Fourth Circuit reached the same result in *Garber v. Saxon Business Products, Inc.*[39] Plaintiff in *Garber* alleged that her discharge resulted from the fact that she had rebuffed the sexual advances of her male supervisor. The court held that the complaint, when liberally construed, alleged "an employer policy or acquiescence in a practice of compelling female employees to submit to the sexual advances of their male supervisors in violation of Title VII."[40]

The First Circuit, on the other hand, has stressed the dichotomy between sexual advances of a personal nature and those which are work-related. In *Fisher v. Flynn*,[41] plaintiff had brought her action under Title VII and 42 U.S.C. Section 1983, claiming that sexual harassment resulted in her termination by her college employer. The district court had dismissed the case on the grounds that plaintiff had failed to allege sufficient facts to state a claim. The court of appeals affirmed, noting that plaintiff failed to allege any facts to connect her department chairman's alleged sexual advances to her termination. Plaintiff failed to allege her department chairman could terminate her employment or effectively recommend such action. Thus, plaintiff must plead and prove that alleged sexual advances have direct employment consequences.

However, the D.C. Circuit Court of Appeals recently held in *Bundy v. Jackson*[42] that a female employee can establish a claim of sexual harassment without having to prove loss or denial of tangible job benefits. Plaintiff Bundy was a vocational rehabilitation specialist. Her supervisors propositioned her and when she complained to their superior he dismissed her complaints stating, that "any man in his right mind would want to rape you." The district court denied relief, finding that plaintiff's supervisors did not take the 'game' of sexually propositioning female employees seriously and that Bundy's rejection of their advances did not evoke in them any motive to take action against her.[43]

The appellate court flatly disagreed. After Bundy complained, her supervisors began to criticize her work performance, though they had not done so before. There was also some evidence to indicate that they were impeding her promotion. The court had little trouble ascribing the discriminatory acts of the supervisors to the agency, since officials of the agency had notice of the harassment and did nothing to investigate or rectify the situation.[44] Turning to the question of whether plaintiff must show a tangible loss of job benefits to state a claim under Title VII the court said:

> What remains is the novel question whether the sexual harassment of the sort Bundy suffered amounted by itself to sex discrimination with respect to the "terms, conditions, or privileges of employment." Though no court has as yet so held, we believe that an affirmative answer follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination.[45]

Citing a number of cases holding that Title VII guarantees employees the right to work in a racially nondiscriminatory environment, the court concluded in *Bundy* that the principle applies equally to sexual harassment. To do otherwise, the court said, would permit an employer to "harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistence." [46]

The court determined that injunctive relief was appropriate and found that the Equal Employment Opportunity Commission's *Final Guidelines on Sexual Harassment* [47] offered a basis for framing that relief. The language suggested by the court for the injunction to be granted by the district court on remand included a broad definition of sexual harassment modeled after the *Guidelines*, notification to all employees of Title VII's prohibition against sexual harassment, establishment of a complaint procedure, appropriate sanctions against employees found to be guilty of sexual harassment, and the development of appropriate means to instruct employees as to the harmful effects of sexual harassment. [48]

BURDEN OF PROOF IN TITLE VIl SEXUAL HARASSMENT CASES

The District of Columbia Court of Appeals next set forth a guide for the district court to use in allocating the burden of proof on plaintiff's claims for back pay and promotion. (*Bundy v. Jackson* was decided before the Supreme Court's further clarification of the burden of proof in Title VII cases in *Texas Department of Community Affairs v. Burdine*. [49]) The court of appeals in *Bundy* proposed to adjust the burden of proof formula prescribed by the Supreme Court in *McDonnell Douglas v. Green* [50] as follows:

> To establish a prima facie case of illegal denial of promotion in retaliation against the plaintiff's refusal of sexual advances by her supervisors, the plaintiff must show (1) that she was a victim of a pattern or practice of sexual harassment attributable to her employer (Bundy has, of course, already shown this); and (2) that she applied for and was denied a promotion for which she was technically eligible and of which she had a reasonable expectation. If the prima facie case is made out, the employer then must bear the burden of showing, by clear and convincing evidence, that he had legitimate nondiscriminatory reasons for denying the claimant the promotion. As in *McDonnell*, if the employer successfully rebuts the prima facie

> case, the claimant should still have the opportunity to prove that the employer's purported reasons were mere pretexts. (Emphasis added).[51]

This is exactly the type of "modification" later rejected by the Supreme Court in the *Texas Department of Community Affairs* case. In *Texas Department of Community Affairs*, plaintiff claimed that the failure of the state agency to promote her and the subsequent decision to terminate her employment had been predicated on gender discrimination. The district court had held that neither decision was based on gender discrimination, but the Fifth Circuit reversed, reaffirming its view that a defendant employer in a Title VII case bears the burden of proving by a preponderance of the evidence that there were legitimate nondiscriminatory reasons for the employment action after plaintiff has proved a prima facie case. Further, the Fifth Circuit had held that the defendant must also prove that those hired or promoted were better qualified. The Supreme Court reversed, holding that the Fifth Circuit "misconstrued the nature of the burden that *McDonnell Douglas* and its progeny place on defendant."[52] In the words of the Court, "when the plaintiff has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its action."[53] Thus, in a Title VII case plaintiff retains the burden of persuasion. It does not shift to the defendant after plaintiff has proved its prima facie case.

Likewise, it seems clear that the *Bundy* court's requirement that defendant bear the burden of showing by clear and convincing evidence that he had legitimate nondiscriminatory reasons for not promoting plaintiff is erroneous. In a case involving alleged sexual harassment, as in any other Title VII action, the employer retains the discretion to choose among equally qualified candidates as long as this decision is not based upon unlawful discriminatory criteria. Title VII "does not demand that an employer give preference to minorities or women."[54]

EEOC FINAL INTERPRETIVE GUIDELINES ON SEXUAL HARASSMENT

As earlier noted, the Equal Employment Opportunity Commission issued far reaching *Final Guidelines on Sexual Harassment*.[55] The Supreme Court has held that EEOC guidelines are entitled to great weight and deference,[56] but where the EEOC has exceeded the scope of its authority as set forth in the enabling legislation, the Court has rejected and overruled the guidelines in question.[57]

The *Guidelines* provide that acts of sexual harassment are violative of Title VII of the Civil Rights Act of 1964. Sexual harassment is defined as "(u)nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[58] The *Guidelines* make an employer responsible for its acts of sexual harassment and those of its agents and supervisory employees, regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.[59] In short, the Commission has adopted the strict liability standard enumerated in *Miller v. Bank of America*.[60] An employer may also be held responsible for acts of sexual harassment in the workplace between fellow employees where the employer, or its agents or supervisory employees knew or should have known of such conduct. An employer, however, may rebut such apparent liability for the acts of non-supervisory employees "by showing that it took immediate and appropriate corrective action."[61]

Section 1604.11(e) of the *Guidelines* astonishingly provides that employers may be liable for acts of sexual harassment committed in the workplace against employees by non-employees, though, as in subsection (a), to be found liable, an employer must have had knowledge, express or implied, and failed "to take immediate and appropriate corrective action." Before imposing liability on the employer, the "Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees."[62]

The final section of the Guidelines provides that acts of sexual harassment with respect to one employee may constitute unlawful discrimination with respect to others. Section 1604.11(g) provides that "where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit."

Future litigation will undoubtedly be directed at such issues as the employer's liability for the actions of its nonsupervisory employees, what constitutes an "offensive working environment" and whether a plaintiff can indeed prevail in the absence of any tangible loss of job benefits; under what circumstances sexual harassment unreasonably interferes with an employee's work performance, whether the employer can be held liable for the actions of non-employees, what sort of "immediate and appropriate corrective action" is sufficient to get the employer off the hook, and the extent to which employers may be held liable (if at all), for denial of employment opportunities to persons because such opportunities or benefits have been granted to others in return for requested sexual favors.

CONCLUSION

Sexual harassment and sexual misconduct are unusually thorny issues for school officials, and advice and guidance are needed to help them through this new Title VII thicket. Section 1604.11(f) of the Guidelines suggests that an employer take affirmative steps to prevent sexual harassment from occurring. Accordingly, boards of education may wish to consider doing one or more of the following:

> (1) Adopt and post a policy statement on sexual harassment expressing the board's strong disapproval and stating what sanctions or disciplinary action will be taken against an employee who engages in sexual harassment.
>
> (2) Adopt a formal procedure to deal with complaints by any employee who feels that he or she has been the victim of sexual harassment.
>
> (3) Designate a specific person to investigate complaints and counsel employees who have concerns relating to sexual harassment.

FOOTNOTES

[1] C. MacKinnon, *Sexual Harassment of Working Women* at 1,333 (1979).

[2] *Id.* at 31.

[3] 45 Fed. Reg. 74674-74677 (1980) to be codified at 29 C.F.R. Section 1604.11(a)-(f).

[4] No. 79-217 (D. Del. Nov. 7, 1980).

[5] 498 F. Supp. 555 (1980). Plaintiff's adulterous relationship with the college librarian was not protected by the constitutional right of privacy. However, plaintiff's procedural and substantive due process rights, as well as his First Amendment right to petition for redress of grievances, were violated. *Cf.* Drake v. Covington County Board of Education, 371 F. Supp. 974, 979 (M.D. Ala. 1974) (State violated plaintiff's constitutional right of privacy in nonrenewing her employment contract because of out-of-wedlock pregnancy); Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975), *cert. dismissed*, 425 U.S. 559, 96 S. Ct. 1752 (1976) (school board rule denying employment to unwed parents was a denial of equal protection).

[6] Annot., *Sexual Conduct as Ground for Dismissal of Teacher or Denial or Revocation of Teaching Certificate*, 78 A.L.R.3d 19, 25.

[7] *Id.* at 35-40.

[8] ______ Tenn. App.________, 604 S.W.2d 872 (1980), *cert. denied*, ______U.S.______, 101 S. Ct. 927 (1981).

[9] *Id.* at ______, 604 S.W.2d at 874.

[10] Alexander v. Yale, 459 F. Supp. 1 (D. Conn. 1977).

[11] 24 FEP Cases 305 (D.D.C. 1980). The court rejected the Title VII claim because defendant's sexual advances did not constitute a condition of continued employment.

[12] 461 F. Supp. 894 (D.N.J. 1978); 465 F. Supp. 1141 (D.N.J. 1979).

[13] No. 488584-7 (Sup. Ct. Calif., March 10, 1980).

[14] Monge v. Beebe Rubber, 114 N.H. 130, 316 A.2d 549 (1974)

15 In re Nancy J. Fillhouer, App. No. 75-5225, California Unemployment Insurance Appeals Board (July 25, 1975); In re Carmita Wood, App. No. 207, 958, New York State Department of Labor, Unemployment Insurance Appeals Board (October 6, 1975); Cathy Hamilton v. Appleton Electric Co., E.R.D. Case 7301025, State of Wisconsin Department of Industry, Labor and Human Relations (October 1, 1976).

16 *See* Annot., *Sexual Advances by Employee's Superior as Sex Discrimination Within Title VII of the Civil Rights Act of 1964*, 46 A.L.R. Fed. 224; Note, *Sexual Harassment and Title VII: The Foundation for Elimination of Sexual Cooperation as Employment Condition*, 76 Mich. L. Rev. 1007 (1978).

17 The 1972 amendments to Title VII extended coverage of Title VII to public agencies, including school boards.

18 In fact there was little discussion of sex discrimination prohibition since it was belatedly added to the Act by its opponents in a last-ditch effort to cause the bill's defeat. See 110 Cong. Rec. 2577 (1964) (remarks of Representative Smith); Id. at 2581-2582 (remarks of Representative Green).

19 44 Fed. Reg. 23805.

20 *Sexual Harassment Lands Companies in Court*, BUSINESS WEEK, Oct. 1979 at 120. *See also* Safron, *What Men do to Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, Nov. 1976, at 149 Pogrebin, *The Working Woman: Sex Harassment*, LADIES HOME JOURNAL June 1977, at 24; Bernstein, *Sexual Harassment on the Job and How to Stop It*, HARPERS BAZAAR, Aug. 1976, at 12.

21 390 F. Supp. 161, (D. Ariz. 1975), *vacated* and *remanded* on other grounds, 562 F.2d 55 (9th Cir. 1977).

22 390 F. Supp. at 163.

23 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds. sub. nom* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

24 413 F. Supp. at 660.

25 418 F. Supp. 233 (N.D. Calif. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

26 *Id*. at 235-236

27 600 F.2d 211 (9th Cir. 1979).

28 *Id*. at 213.

29 *Id.*

30 Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Tomkins v. Public Service Electric and Gas Co., 568 F.2d 1044 (3d Cir. 1977); Garber v. Saxon Business Products, Inc., 552 F.2d 1032 (4th Cir. 1977).

31 Barnes v. Train, No. 1828-73 (D.D.C. Aug. 9, 1974); Tomkins v. Public Service Electric & Gas Co., 422 F. Supp. 553 (D.N.J. 1976); Garber v. Saxon Business Products, Inc., 14 EPD Paragraph 7586 (D. Va. 1976).

32 561 F.2d 983.

33 *Id.* at 990.

34 *Id.*

35 400 U.S. 542, 91 S. Ct. 496 (1971).

36 568 F.2d 1044 (3d Cir. 1977).

37 *Id.* at 1048-1049.

38 *Id.* at 1047

39 552 F.2d 1032 (4th Cir. 1977).

40 *Id.*

41 598 F.2d 663 (1st Cir. 1979).

42 641 F.2d 934 (D.C. Cir. 1981).

43 *Id.* at 940.

44 *Id.* at 943.

45 *Id.* at 943-4.

46 *Id.* at 945.

47 *Id.* at 947, citing 45 Fed. Reg. at 74677 (1980).

48 *Id.* at 947.

49 _____ U.S.______, 101 S. Ct. 1089 (1981).

50 411 U.S. 792, 93 S. Ct. 1817 (1973).

51 641 F.2d at 953.

52 ______U.S. at______, 101 S. Ct. at 1095.

53 *Id.* at _____, 101 S. Ct. at 1097

54 *Id.*

55 45 Fed. Reg. at 74677.

56 Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849 (1971).

57 Trans World Airlines Inc. v. Hardison, 432 U.S. 63, 97 S. Ct. 2264 (1977). General Electric Co. v. Gilbert, 429 U.S. 125, 97 S. Ct. 401 (1976).

58 29 C.F.R. Section 1604.11 (a).

59 *Id.* at Section 1604.11 (c)

60 600 F.2d 211.

61 29 C.F.R. at Section 1604.11 (d).

62 *Id.* at Section 1604.11 (e).

THE SUPREME COURT EXPANDS LIABILITY:

OWEN v. INDEPENDENCE AND *MAINE v. THIBOUTOT*

By: Patricia Wright Morrison

INTRODUCTION: SECTION 1983 LIABILITY AFTER *MONELL*

In 1978 the United States Supreme Court in the watershed decision of *Monell v. Department of Social Services of New York*[1] held that local governing bodies, including school districts and municipal corporations, could be sued directly for monetary, declaratory, and injunctive relief. *Monell* signaled a fundamental shift in the direction of civil rights litigation.[2] Two recent Supreme Court decisions, *Maine v. Thiboutot*[3] and *Owen v. City of Independence*[4] delineate the scope of this new jurisdiction. They require the attention of every representative of a local school district.

The *Monell* Decision

In *Monell*, female employees sued the Department of Social Services and the Board of Education of the City of New York, challenging the policies of those bodies which required pregnant employees to take unpaid leaves of absence. The women argued that the pregnancy policy violated their constitutional right to equal protection. The claim was based on 42 U.S.C. Section 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

The defendants in *Monell*, including the Board of Education, claimed immunity, alleging that they were not "persons" as that term was used by Congress when it enacted the original legislation.[5] Their authority for this position was *Monroe v. Pape*[6] which held that a city could not be sued under Section 1983, based on the legislative history of the section.

The Supreme Court in *Monell*, however, took a fresh look at the legislative history and reached a contrary result: boards of education were included in the concept of "person" as that term was used by Congress in the original legislation.[7] Accordingly, local governing bodies could be sued in federal court for constitutional violations.

This new exposure to liability was explicitly limited in the *Monell* decision by two conditions. First, governmental bodies were liable only for constitutional violations committed pursuant to "official policy." "Official policy" was defined as either "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or a "custom," not formally approved but nevertheless sanctioned by the entity through practice.[8] Second, the governmental defendant could not be held liable vicariously for the torts of its employees. Liability would not be extended to the political entity by the theory of respondeat superior.[9]

The *Owen v. City of Independence* Decision

One question left unanswered by *Monell* was whether school districts were entitled to a limited immunity if the action by their officers or agents, though subsequently determined to be a constitutional offense, was taken in good faith and without malice. Did the good faith defense defined in *Wood v. Strickland*[10] apply to local governments?

In *Wood v. Strickland*, students were expelled for violating a school rule prohibiting the use or possession of intoxicating beverages on school grounds. The students sued the school board members and administrators for violation of their due process rights to a hearing. The defendants claimed immunity in that the action alleged to be offensive -- the expulsion -- was taken in their official capacity.

The Supreme Court reviewed the history of the common law doctrine of legislative and judicial immunity and concluded that the board members were entitled to a "qualified good faith immunity" under Section 1983.[11] The Court, however, narrowly defined the conditions of that immunity:

> [I]n the specific context of school discipline, we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action

> he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or it he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[12]

Accordingly, in some situations board members and administrators would not be held liable even though their actions were wrongful. The courts would grant a limited immunity to protect the decisionmaking process of public school officials when they could not have known at the time of their action that they were violating the plaintiff's constitutional rights. The issue which remained was whether it shielded the governmental unit as well as the individuals who represented it.

That question was answered by the Supreme Court this past year in the negative in the case of *Owen v. City of Independence*. Owen was the chief of police in Independence, Missouri in 1972 when he was summarily dismissed by the city manager following a dispute over management of the police department's property room. He filed suit against the city,[13] claiming that because of the allegations surrounding his termination, his constitutional right to a name-clearing hearing had been violated. In defense the city claimed, *inter alia*, that the injury, if any, was not the result of official policy and furthermore, if the city was in error, it was entitled to the qualified good faith immunity of its officials.[14] The Eighth Circuit Court of Appeals found a constitutional violation, but held that all respondents, including the city, were entitled to qualified immunity from liability.[15] Owen appealed. The Supreme Court reversed, holding that "the municipality may not assert the good faith of its officers or agents as a defense to liability under Section 1983."[16]

The Court once again returned to the legislative history of the Civil Rights Act of 1871 and determined that governmental immunity was not intended when Congress passed the act.[17] In addition, the Court examined the public policy implications of immunity and found the act required governmental liability for three reasons: (1) to protect those wronged by the misuse of power, (2) to "create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights,"[18] and (3) to "encourage those in a policy-making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights."[19] In the words of the dissenters,[20] the effect of the majority opinion is that "municipalities will have gone in two short years from absolute immunity under Section 1983 to strict liability."[21]

In sum, governmental entities, including school districts, can be liable if they inadvertently violate the rights of an employee or student.

The *Maine v. Thiboutot* Decision

Two months later the Supreme Court extended this liability even further. In *Maine v. Thiboutot*, a married couple claimed they were denied certain welfare benefits to which they were entitled under federal statutes by the way the state's Department of Human Services administered the program. The issues before the court were "(1) whether Section 1983 encompassed claims based on purely statutory violations of the federal social security laws and (2) if so, whether attorney fees authorized by Section 1988 of the Civil Rights Acts may be awarded to the prevailing party."[22] In the past, Section 1983 had been used to enforce constitutional infringements, but not to enforce purely statutory rights unrelated to civil rights. Now, however, the Court answered both questions in the affirmative. The Court's conclusion was based on what the Court considered to be the unambiguous language of Section 1983 which, as quoted above, provides a remedy for "the deprivation of any rights, privileges or immunities secured by the Constitution and laws. . . ." (Emphasis added).[23]

Three of the justices joined in a dissent challenging not only the "plain meaning" of the phrase "and laws"[24] but also expressing substantial concern for the broad implications of the ruling:

> In practical effect, today's decision means that state and local governments, officers, and employees now may face liability whenever a person believes he has been injured by the administration of any federal-state cooperative program, whether or not that program is related to equal or civil rights.[25] (Emphasis in the original).

This new liability is especially distressing because the state itself may have some immunity from Section 1983 liability on the basis of the Eleventh Amendment,[26] and Section 1983 does not grant a right of action against the federal government.[27] Consequently, the dissent reasoned, the local government will be the focus of all complaints unless there are specific alternative remedies in the federal legislation.[28]

Furthermore, the dissent found that with this new liability comes the clear risk of attorney fees.[29] Thus plaintiffs may choose to bring suit against school districts under Section 1983 even when there are specific alternative federal remedies, solely for the purpose of obtaining attorney fees under Section 1988.

In sum, the *Thiboutot* case is cause for alarm. Coupled with the strict liability now visited upon local governmental entities by *Owen*, it requires major rethinking for all local governmental defendants. These defendants must make every effort to restrict the broad exposure created by the new ruling and to discover and develop the remaining defenses to minimize the wave of new litigation. What follows is an attempt to identify some of those defenses.

DEFENSES TO SECTION 1983 LITIGATION

Lack of Official Policy

When the Supreme Court construed Section 1983 to apply to local governmental units in *Monell*, it specifically restricted its application to actions taken pursuant to official policy. Official policy was distinguished from the torts of the municipality's employees. [30] Therefore, in those cases where the alleged offense is not the direct result of official policy, there is no violation of plaintiff's rights by the governmental unit and, accordingly, no proper claim against the public body. Such an improper case may involve claims of personal injury against school districts for the torts of their employees [31] or claims of defamation in the termination of employees by school boards. [32] In sum, not every disciplinary action or termination can be challenged under Section 1983. [33]

The primary problem with this defense is a management one. If both the school board and its employees are named in the suit, the board's defense that the action at issue is not the result of official policy may directly contradict the employee's good faith defense and pit the employer against its officers and employees. For example, in Ohio, corporal punishment is legal. [34] If a student sues the board and a teacher for an alleged beating, the teacher may argue that he is entitled to good faith immunity because he was acting pursuant to board policy. The board, on the other hand, may want to take the position that the teacher violated the policy by the manner in which he administered the discipline. If the teacher prevails in his immunity defense, the board may lose, yet if the board persuades the Court that the teacher was acting beyond the scope of the policy, the teacher will surely lose on his good faith defense.

In sum, every Section 1983 complaint should be reviewed to determine whether the action causing the alleged injury was the result of official policy. Furthermore, when individuals are co-defendants with the school board, separate counsel may be necessary if the official policy defense is inconsistent with the good faith defense. In any event, the Supreme Court's decision in *Owen*, that public bodies are not entitled to a qualified immunity affects the discretion of those bodies, for now every action may be second guessed and damages assessed for each decision ultimately found wrong.

The Limitations of 28 U.S.C. Section 1343 Jurisdiction

Maine v. Thiboutot, held that local public bodies could be sued for violations of federal statutes as well as constitutional claims under Section 1983. Section 1983, however, is not a jurisdictional statute; Section 1343(3) of Title 28 supplies the typical jurisdictional basis for Section 1983 litigation. Section 1343(3), however, is restricted to claims involving rights supplied by the Constitution "or by an Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." [35] It is not broad enough to enforce claims for violations of the Social Security Act [36] or other similar federal statutes now made applicable through *Thiboutot*, against the local government. [37]

However, plaintiffs wishing to sue the board of education under Section 1983 and a non-civil rights federal statute, such as the National School Lunch Act, [38] can file their claims under Section 1331 of Title 28. Section 1331 used to require that there be at least $10,000 in controversy but was recently amended to eliminate this requirement. [39] Nevertheless, every claim for a statutory violation filed pursuant to Section 1983 should be reviewed to determine whether the proper jurisdictional basis has been alleged.

Failure to Establish Notice

Monell held that public bodies are "persons" under Section 1983. The Supreme Court conceivably might be further persuaded that as persons such units are entitled to the protections of the civil rights statute, as well as being exposed to the risks. If that case can be made -- and logically it is sound [40] -- then a school board cannot be found responsible for a constitutional violation unless it knew before it acted that its conduct was illegal. Notice, after all, is a fundamental element of due process. [41] Accordingly, unless plaintiff establishes that the school board was on notice of the potential constitutional infringement, the board should not be penalized for its action.

This defense is, to date, theoretical. But it should not be dismissed as purely academic in light of the very narrow majority for the *Owen* and *Thiboutot* decisions. Justice Powell, writing the dissent in *Owen*, clearly expressed concern for the broadened liability which the majority dictated, stating that: "As a policy matter, I believe that strict municipal liability unreasonably subjects local governments to damages (sic) judgments for actions that were reasonable when performed. It converts municipal governance into a hazardous slalom through constitutional obstacles that often are unknown and unknowable." 42

Furthermore, such a defense recognizes the reality of the bureaucratic mentality. The majority opinion in *Owen* does a disservice to the public employee when it presumes that protection from personal liability is adequate to guarantee his "willingness to execute his office with the decisiveness and judgment required by the public good." 43 What public employee will terminate the contract of a non-tenured subordinate if he believes such action puts his employer, the school board, at risk of protracted civil rights litigation and awards of substantial back pay and considerable attorney fees years hence because of the subsequent statement of a board member distorted by the media? Public officials want to make the right decision. A school board should not be penalized when its members do not correctly anticipate subsequent judicial temperment.

Recognition of a notice requirement would restore balance to civil rights litigation and be consistent with the Supreme Court's ruling in the *Monell* decision. Counsel for school boards might raise it as a defense in Section 1983 litigation when plaintiff is attempting to make new law.

The Same Decision Anyway Defense

The Supreme Court recognized another important defense for public bodies in civil rights litigation in *Mt. Healthy Board of Education v. Doyle*. 44 That case involved a non-tenured teacher who was given timely notification by the school board that his contract would not be renewed for the following year. When he asked the superintendent the reasons for the decision, several were given, including the fact that the teacher had called a local radio station to complain about a faculty dress code. The teacher claimed that the telephone call was protected by the First Amendment and, therefore, the school board was obligated to reinstate him. The Supreme Court agreed that the phone call was constitutionally protected, however, it disagreed with the automatic reinstatement. The Court declined to prevent a school board from dismissing a teacher who had engaged in some form of constitutionally protected conduct if the board would have made the same decision anyway based on other unprotected conduct. 45

The Court established a three-step analysis. First, the employee must show that his conduct was protected. Next, he must prove that the protected conduct was a "substantial" or "motivating factor" in the questioned decision. If the employee successfully makes this case, then the burden shifts to the employer to show that the same decision would have been reached "even in the absence of the protected conduct." 46

The Court subsequently characterized this *Mt. Healthy* standard as a "but for" test. [47] Furthermore, the Court has applied the *Mt. Healthy* analysis in discrimination cases as well as employment litigation. [48] In both situations the *Mt. Healthy* analysis allows a court to review the decision of a governmental body without substituting its judgment for that of the elected officials who have responsibility for the decisions. On those occasions when the school board has some discretion, the "same decision anyway" defense allows the board room to exercise its prerogatives without infringing on the rights of those who claim mistreatment. It is a method of balancing the government's duty to act responsibly against the individual's right to be protected from abuse of power. Counsel for the school board will find the *Mt. Healthy* defense a valuable shield to protect public decision-making.

Failure To Allege A Deprivation of a Protected Right

Section 1983 imposes civil liability only upon one who deprives another of a right, privilege or immunity "secured by the Constitution and the laws. . . ." Consequently, if the injury complained of does not constitute the violation of such a right, plaintiff does not have a Section 1983 claim.

This defense was recognized by the United States Supreme Court in *Baker v. McCollan*. [49] There, plaintiff claimed he was unlawfully arrested and detained by the police in violation of his civil rights under Section 1983. The Court, however, disagreed because the action by the police was taken pursuant to a valid arrest warrant even though the wrong man was arrested. Since the warrant conformed "to the requirements of the Fourth Amendment," no constitutional rights were violated. In sum, even though the wrong person was arrested and held, the plaintiff did not have a constitutional claim since the warrant was valid. [50]

Similarly in *Studen v. Beebe*, [51] the Sixth Circuit declined to extend Section 1983 jurisdiction to a zoning case because plaintiff could not show the deprivation of a right, privilege or immunity secured by the Constitution or the laws of the United States. In *Havas v. Thornton*, [52] the Ninth Circuit held that no constitutional right was violated in a complaint alleging that state officers brought malicious actions to humiliate plaintiffs. The court ruled that the mere fact that acts allegedly constituting a tort were performed by state officials did not transform the claim into one for the deprivation of civil rights. [53] And in *Heard v. Lafourche Parish School Board*, [54] the alleged failure of a principal to provide protection for a student who died as a result of a fight with another student while on school premises did not state a cause of action under the Civil Rights Act. Citing the *Baker* case, the United States District Court for the Eastern District of Louisiana held that "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violation of duties of care arising out of tort law."[55] A tort does not become a constitutional deprivation upon being committed by a state official.[56]

This argument can also be made in an appeal involving the Education for All Handicapped Children Act.[57] Every appeal is not automatically a Section 1983 claim. If proper procedures are followed, a board should have the right to be wrong.

On the other hand, when the offensive action by school officials clearly involves a constitutional right, courts will entertain Section 1983 litigation. Thus, in *M.M. v. Anker*,[58] the Second Circuit ruled in the student's favor in a case involving an intrusive body search when there was not sufficient information that the student was in possession of stolen objects to warrant the search.

The doctrine of primary jurisdiction may be an appropriate form of defense in those Section 1983 cases where plaintiff alleges claims under specific federal statutes with established regulatory administrative procedures as well as the general remedial provisions of Section 1983. Basically, the doctrine of primary jurisdiction requires that a court decline to exercise its jurisdiction because relief has been made available in a specific administrative proceeding established by Congress. The leading case is *Far East Conference v. United States*,[59] where the Supreme Court declined to determine shipping rates under patronage contracts on the basis that the issues were so technical and required such expertise that it could not render a decision until the question had been submitted to the United States Shipping Board, the agency established by Congress to consider such disputes. The Court ruled that the administrative review should not be passed over by direct appeal to the court.

This analysis has been extended to Section 1983 litigation, for example, by the United States District Court for the Western District of Pennsylvania in *Stubbs v. Kline*.[60] There, plaintiffs brought a claim of discrimination on behalf of their handicapped child against a school district, based on the Fourteenth Amendment, Section 1983, and the Rehabilitation Act. The court declined to hear either the constitutional or Section 1983 allegations until the matter had been considered by the administrative agency designated by Congress under the Rehabilitation Act to decide such issues. The court explained its action as follows:

> The doctrine of primary jurisdiction has been developed by courts in order to avoid conflict between the courts and an administrative agency arising from either the court's lack of expertise with the subject matter of the agency's regulation

> or from contradictory rulings by the agency and the court. Under the doctrine, a court should refer a matter to an administrative agency for resolution, even if the matter is otherwise properly before the court, if it appears that the matter involves technical or policy considerations which are beyond the court's ordinary competence and within the agency's particular field of expertise. [61]

It should be noted that under this theory it is not necessary for the administrative remedy to be exclusive. What is required is that the issue be technical, beyond the ordinary competency of a court.

In a Section 1985 action, *Great American Federal Savings & Loan Association v. Novotny*, [62] the Supreme Court extended this theory even further to hold that Title VII provides an exclusive remedy. The court would not allow plaintiffs to bring their sex discrimination action as a conspiracy charge under Section 1985 because to do so would impair the effectiveness of the detailed and specific procedural provisions of Title VII. This analysis may be expanded to Section 1983 litigation.

As school districts are increasingly mandated to follow complicated federal regulations, for example, in the areas of sex discrimination and education of the handicapped, the school attorney may want to compel plaintiffs to seek relief through the specific channels identified by Congress, rather than Section 1983. Not only might the established regulatory scheme give the board a more knowledgeable forum in which to resolve a technical issue, but in some instances it might also relieve the school board from the risk of having to pay attorneys' fees. [63] Thus, while this approach is not strictly speaking a defense to a Section 1983 claim, it may have the same effect of avoiding the broad liability under the Civil Rights Act.

Legislative Immunity

The *Owen* case held that a municipality as a separate defendant was not entitled to the qualified immunity of its officers. Since *Owen*, however, a district court in the Second Circuit has carved out an exception to this rule when the school district is acting in a legislative capacity and the policy itself is not unconstitutional. In *Gorman v. Tilles*, [64] parents objected to a school policy pertaining to the admission of five-year-olds into kindergarten. State law provided that a school district was not required to admit five year olds born after December 1 to kindergarten although private kindergartens could admit children one month younger, i.e., December children. The public schools had provided transportation for these December children until, in a prior suit, the court found the policy providing such financial assistance unconstitutional. The court enjoined further aid to the December children in private schools unless December children were admitted to public kindergarten.

After discussion, the school board voted to withdraw public benefits from December children in private kindergarten, and their parents filed suit alleging this policy was in retaliation of their asserting their constitutional rights in the first case. The defendants asserted an absolute legislative immunity defense.

The *Gorman* court reviewed the history of legislative immunity in *Tenny v. Brandhove*, (state legislators);[65] *Lake County Estates Inc. v. Tahoe Regional Planning Agency*,[66] (regional planning board), and *Supreme Court of Virginia v. Consumers Union of the United States*,[67] (judges promulgating the Virginia Code of Professional Responsibility) and concluded that the relevant question was not the nature of the activity being challenged which determined the appropriateness of legislative immunity. If the activity were legislative, the district court noted that the Supreme Court extended immunity from state legislators, to regional planning authorities, to judges.

Viewed from this perspective, the court distinguished *Wood v. Strickland*, which had given school officials only a qualifed immunity, reasoning that the *Wood* ruling applied only when the public officer was acting in an executive or administrative capacity such as in school discipline. When the school official was acting in a legislative capacity such as here, where a school policy was at issue, the *Wood* limitations did not apply. The officials were given absolute immunity to protect the decision-making process which required the balancing of competing educational and fiscal considerations.

In addition, the court extended this protection to the school district itself, on a finding that there was no allegation of a constitutional deprivation based on the policy itself. Plaintiff's claim arose from the retaliatory motive alone. Absent an improper policy, plaintiff's claim against the school district was insufficient under *Monell*. Accordingly, on its own motion the court dismissed the case against the school district.

This case is helpful to individual officers sued because of their legislative activity. It does not, however, address the liability of the entity itself for an unconstitutional policy, i.e., the *Owen* question. However, it would seem to defy common sense not to protect the legislative process of the entity while the individuals are shielded, because the entity cannot act except through its members.[68]

Collateral Estoppel

Finally, attention is called to the collateral estoppel defense recognized by the Supreme Court in *Allen v. McCurry*. [69] This case decided the question of whether a plaintiff in federal court could relitigate a federal constitutional claim under Section 1983 after it had been fully litigated in state court. The court ruled plaintiff could not. Accordingly, when a plaintiff sues in both state and federal court for an alleged violation of a Section 1983 right and that right is fully litigated in state court, plaintiff cannot then relitigate the matter in a federal forum. [70] Here again, the defense may be critical in that, by dismissing the federal Section 1983 action, the school district may avoid plaintiff's attorney fees.

CONCLUSION

There can be no doubt that the recent actions of the Supreme Court in *Monell*, *Owen* and *Thiboutot* have substantially increased the exposure of all local bodies to civil rights litigation and the concurrent risk of attorney fees. However, there are limits to this new vulnerability, limits which should become increasingly well-defined as courts address specific claims and examine particular defenses. This paper has attempted to alert the school attorney to the new scope of civil rights litigation and to suggest some defenses which may restore balance to the litigation.

School boards have long had the duty to protect the constitutional rights of individuals. [71] They should be held to that task. On the other hand, school districts perform legislative and quasijudicial functions which sometimes require tough decisions. That discretion must also be protected for the public good. Care is needed now to balance these interests.

FOOTNOTES

[1] 436 U.S. 658, 98 Ct. 2018 (1978).

[2] Monell overruled Monroe v. Pape, 365 U.S. 167 81 S. Ct. 473 (1961), which had recognized an absolute immunity for municipalities from civil rights liability for all matters filed pursuant to 42 U.S.C. Section 1983. In Moor v. Alameda County, 411 U.S. 693, 93 S. Ct. 1785 (1973), the Monroe immunity was extended to counties.

[3] ______U.S. ______, 100 S. Ct. 2502 (1980).

[4] ______U.S. ______, 100 S. Ct. 1398 (1980).

[5] 42 U.S.C. Section 1983 was originally part of the Civil Rights Act of 1871. The Supreme Court has written extensively about the legislative history of that act in Monroe v. Pape, Monell and the two decisions which are the topic of this paper.

[6] 365 U.S. 167, 81 S. Ct. 473 (1961).

[7] 436 U.S. at 689, 98 S. Ct. at 2035.

[8] *Id*. at 690-91, 98 S. Ct. at 2036.

[9] *Id*. at 693-94, 98 S. Ct. at 2037.

[10] 420 U.S. 308, 95 S. Ct. 992 (1975).

[11] *Id*. at 318, 95 S. Ct. at 1000.

[12] *Id*. at 322, 95 S. Ct. at 1001.

[13] ______U.S. at ______, 100 S. Ct. at 1405. The city manager and the present members of the council in their official capacities were also named as defendents.

[14] *Id*. at _______, 100 S. Ct. at 1405-06. The case went to the Supreme Court originally on the issue of jurisdiction over the city directly under the Fourteenth Amendment based on Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999 (1971). The court remanded the case for further consideration in light of Monell, *supra*.

15 589 F.2d 335 (8th Cir. 1978). *See also* Sala v. County of Suffolk, 604 F.2d 207 (2d Cir. 1979). *But see* Bertot v. School Dist. No 1, 613 F.2d 245 (10th Cir. 1979) (en blanc); Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (7th Cir. 1975); and Hander v. San Jacinto Junior College, 519 F.2d 273, *reh. denied*, 522 F.2d 204 (5th Cir. 1975) (refusing to extend qualified immunity to the governmental entity).

16 _____U.S. at ______, 100 S. Ct. at 1409

17 *Id*. at ______, 100 S. Ct. at 1408, 1411 - 12.

18 *Id*. at ______, 100 S. Ct. at 1415 - 16.

19 *Id*. at ______, 100 S. Ct. at 1416.

20 *Id*. at _______, 100 S. Ct. at 1419 (Powell, J., with Burger, C.J. and Rehnquist, J., dissenting). Not only did the dissent find that Owen suffered no constitutional deprivation, but they also noted that the city, under *Monell*, could not be held liable on a theory of *respondeat superior* for the stigmatizing statements of one of the councilmembers. *Id*. at ______, 100 S. Ct. at 1422.

21 *Id*. at ______, 100 S. Ct. at 1423.

22 ______ U.S. at ______, 100 S. Ct. at 2503. 42 U.S.C. Section 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of (42 U.S.C.) Sections 1981, 1982, 1983, 1985 and 1986 of this title. . . ,the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

23 *Id*. at ______, 100 S. Ct. at 2505-06

24 *Id*. at _______, 100 S. Ct. at 2508 (Powell, J., with Burger, C.J., and Rehnquist, J. dissenting). The dissent argued both that the legislative history dictated that the phrase should be restricted to constitutional civil rights violation, and that grammatically the disjunctive "or" would have been used if Congress intended the "plain meaning" the Court now was giving it. *Id*. at _____, 100 S. Ct. at 2508, n. 1.

25 *Id*. at ______, 100 S. Ct. at 2513.

26 *Id.* at ______, 100 S. Ct. at 2513, n. 10.

27 *Id.* at ______, 100 S. Ct. at 2514.

28 *Id.*

29 *Id.*

30 436 U.S. at 692, 98 S. Ct. at 2036.

31 In some states school districts are immune to tort claims. This new section 1983 liability should not affect that immunity when the alleged tort is the result of the employee's negligence.

32 The dissent in *Owen, supra*, thought the facts in *Owen* did not support the claim that plaintiff was injured by the official act of the city but rather subsequent conduct of a councilmember.

33 *See, for example*, Baker v. McCollan, 443 U.S. 137, 99 S. Ct. 2689 (1979) (incarceration of wrong person due to mistaken identification held not cognizable under 42 U.S.C. Section 1983).

34 33 Ohio Rev. Code Ann. Section 3319.41.

35 28 U.S.C. Section 1343(3).

36 42 U.S.C. 3602 (a) (7); Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 99 S. Ct. 1905 (1979).

37 This fact forms a basis for the dissent's argument in *Thiboutot*, ______U.S. at ______, 100 S. Ct. at 2513, that the legislative history does not support the majority's conclusion that Section 1983 applies to all federal laws.

38 42 U.S.C. Section 1751 *et seq.*

39 P. L. 96-486, 49 U.S.L.W. 196.

40 The word "person" is used twice in the sentence which is Section 1983. There is no reason to give it a more restrictive meaning the second time it is used.

41 Lambert v. California, 355 U.S. 225, 228, 78 S. Ct. 240 (1957), *reh. denied* 355 U.S. 937, 78 S. Ct. 410.

[42] ______ U.S. at ______, 100 S. Ct. at 1423.

[43] *Id.* at ______, 100 S. Ct. at 1417 (quoting Scheuer v. Rhodes, 416 U.S. 232, 240, 94 S. Ct. 1683, 1688 (1974).

[44] 429 U.S. 274, 97 S. Ct. 568 (1977).

[45] *Id.* at 287, 97 S. Ct. at 576.

[46] *Id.*

[47] Regents of the University of California v. Bakke, 438 U.S. 265, 320, 98 S. Ct. 2733, 2764, n. 54 (1978).

[48] Bakke, *supra*, and Village of Arlington Heights V. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555 (1977).

[49] 443 U.S. 137.

[50] *See* Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155 (1976). Plaintiff claimed a violation of constitutional protection for his reputation. The court held reputation alone was not a sufficient liberty or property interest to invoke Section 1983 protections.

[51] 588 F.2d 560 (6th Cir. 1978).

[52] 609 F.2d 372 (9th Cir. 1979).

[53] *See also* Green v. DeCamp, 612 F.2d 368 (8th Cir. 1980), Cook v. Houston Post, 616 F.2d 791 (5th Cir. 1980).

[54] 480 F. Supp. 231 (E.D. La. 1979).

[55] *Id.* at 232. (*quoting* Baker v. McCollan, *supra*).

[56] *Id.*

[57] 20 U.S.C. Section 1401 *et seq.*

[58] 477 F. Supp. 837 (E.D.N.Y. 1979), *aff'd*, 607 F.2d 588 (2d Cir. 1979).

[59] 342 U.S. 570, 574, 72 S. Ct. 492, 494 (1952).

[60] 463 F. Supp. 110 (W.D. Pa. 1978).

61 *Id.* at 116, quoting MCI Communications Corp. v. American Telephone & Tel. Co., 496 F.2d 214, 220 (3d. Cir. 1974) (Emphasis added in *Stubbs*).

62 442 U.S. 366, 99 S. Ct. 2345 (1979).

63 *E.g.*, Hines v. Pitt County Board of Educ., 497 F. Supp. 403 (E.D.N.C. 1980). Plaintiff not entitled to attorney's fees under Education for All Handicapped Children Act, *supra*.

64 (Docket No. 79C 2251, E.D.N.Y. December 23, 1980).

65 341 U.S. 367, 71 S. Ct. 783 (1951).

66 440 U.S. 391, 99 S. Ct. 1171 (1979).

67 ______U.S. ______, 100 S. Ct. 1967 (1980).

68 *See* Butz v. Economou, 438 U.S. 478, 98 S. Ct. 2894 (1978) (recognizing judicial immunity).

69 ______U.S. ______, 101 S. Ct. 411 (1980).

70 *See* England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S. Ct. 461.

71 Tinker v. Des Moines Independent Community School District, 393 U.S. 50, 89 S. Ct. 733 (1969).

REGULATIONS BY OCR:

BILINGUAL EDUCATION AND OTHER ISSUES

By: Gwendolyn H. Gregory

BILINGUAL EDUCATION

In the summer of 1975, Terrel Bell, then Commissioner of Education, and Martin Gerry, acting Director, Office for Civil Rights (OCR), issued a joint memorandum to all chief state school officers on the subject of the obligation of local school districts under Title VI of the Civil Rights Act of 1964 to provide special services to limited English-speaking students.[1] That memorandum included as an attachment the now infamous "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful under *Lau v. Nichols*," -- the so-called "Lau Remedies."[2]

On February 2, 1981, Terrel Bell, as Secretary of Education, issued a statement withdrawing former Secretary Hufstedler's proposed *Lau* regulation,[3] on the ground that the proposal was "harsh, inflexible, burdensome, unworkable and incredibly costly."[4] The Department at the same time stated that while it reviewed the regulatory alternatives available, "continued use of the *Lau* Remedies will permit elementary and secondary schools to operate bilingual educational programs that meet local needs and broad national guidelines."[5]

Although the Department's action in withdrawing the previous administration's proposed regulation was worthy of praise, the reference to the "Lau Remedies" was unfortunate because it allowed the Department's operatives in the field to use the same guidelines to harass school districts around the country.

History of the Problem

The history of the bilingual education problem dates back more than a decade. On May 25, 1970, OCR issued a policy statement known as the "May 25th Memorandum,"[6] which was sent to all school districts with more than five percent national origin minority group children. Authority for the document was premised on Title VI of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color or national origin in the operation of any federally assisted programs.[7] The memorandum required, among other things, that where inability to speak and understand English excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students. The memorandum also required school districts which determined that they had compliance problems to communicate in writing with OCR, setting forth the "scope of the program in the area of special language assistance and the extent to which the need is fulfilled...." [8]

On January 21, 1974, the United States Supreme Court handed down its landmark ruling in *Lau v. Nichols*, [9] a class action brought on behalf of approximately 1,800 Chinese-speaking students in the San Francisco school district. The school district was providing no special services for these children, although they did not speak English and were placed in regular English-speaking classrooms. At issue was whether it was an act of discrimination to fail to take affirmative action and provide special services to these students in order that they might participate in the program when the inability to speak English and participate in class was not initially the fault of the district. The case was originally brought under the equal protection clause of the 14th Amendment to the U.S. Constitution but was expanded in the Supreme Court to include Title VI; in particular, the question of whether the Department of Health, Education and Welfare exceeded its authority by issuing the May 25th Memorandum. [10]

The Court did not reach the Constitutional question in its decision but did uphold the memorandum, finding that HEW did not exceed its jurisdiction in issuing the guidelines which asserted an affirmative duty on school districts with a number of limited-English speaking students to provide a "meaningful" education to those students even though their plight was not initially the fault of the school district. [11] However, the question of a remedy was not addressed by the Court. In fact, Justice Douglas, who delivered the opinion of the Court, stated that "[n]o specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to the group in Chinese is another. There may be others."[12]

In 1975, OCR convened a Task Force to develop educational methodologies which could be implemented by school districts which have been found to be in non-compliance with Title VI and the May 25th Memorandum. In the summer of 1975, the Task Force issued the statement which became the "Lau Remedies." [13] Initially this document was not to be used as a compliance standard, having been designed as a technical assistance document for school districts which had been found to be in non-compliance. Ultimately, however, the regional OCR offices began to use the document as a standard to measure whether or not a district was in compliance with Title VI and *Lau*. [14]

In September 1978, after an extensive set of negotiations with OCR on the question of compliance with the "Lau Remedies," the Northwest Arctic School District and several other Alaskan school districts sued HEW, claiming an abuse of their Title VI authority in, among other things, requiring Northwest Arctic to disband its program of individualized educational programs for all of the students in the district in favor of HEW's mandate of a bilingual education plan. Ultimately, the parties entered into a consent agreement, accepted by the court, which in effect upheld the plaintiffs' educational program and which provided that the Department would publish the "Lau Remedies" in the *Federal Register* for public comment.[15] The "Lau Remedies," however, to this date have not been published. In their place, the Carter Administration, under Secretary Shirley Hufstedler, published the now defunct proposed legislation.

The Hufstedler Regulation and the "Lau Remedies"

The primary complaint which educators had about the Hufstedler proposal was that it continued the "Lau Remedies" "tradition" of requiring all school districts to provide a program of transitional bilingual education to limited-English-proficient students, i.e., in districts with more than 25 students with a common language other than English the district must teach "required" subjects using both English and the primary language. A waiver provision was included in the proposal, but in order to receive a waiver for other types of methodologies (such as English as a second language (ESL) or total immersion), the school district would be required to meet very restrictive educational standards -- standards, it should be noted, which could not be met for "transitional bilingual" educational programs.

In many respects, though, the "Lau Remedies" are worse in that they go even farther than the Hufstedler proposal. The remedies place great emphasis on the language most often spoken in the student's home and in informal social situations rather than emphasizing the assessment of English proficiency. The remedies also prohibit the use of ESL programs at the elementary and secondary level and allow transitional bilingual education only if the district can prove that the students will succeed educationally in content areas and in the educational program. There is no allowance made for failure because of factors other than language proficiency. High Intensity Language Training (HILT) or total immersion programs are also not allowed by the remedies. In fact, educational programs which are allowed without restriction are bilingual/bicultural or multilingual/multicultural ones.[16]

Both the Hufstedler approach and the "Lau Remedies" make an important assumption for which there appears to be no educational basis, that is, that a limited English-proficient student cannot learn required subjects except in his native language.[17] Were that assumption true, then much of both documents would have to be accepted as compliance standards. However, the state of the art is such that no assumptions can be made as to which methodology even works, much less works better than another method. More research is needed in this area, although it is unlikely that there will ever come a time when it can be shown that one method is the best for all children in all settings -- even as it cannot be shown that there is one best method for teaching reading or writing.

Title VI Discrimination and Bilingual Education

At the outset, it should be noted that Title VI of the Civil Rights Act of 1964 prohibits discrimination only on the basis of race, color or national origin. Thus, if language difficulties are the result of the national origin of the student -- Title VI requirements attach. However, if the student's English language difficulties are the result of a learning disability -- although there may be some duties under P.L. 94-142 [18] or Section 504, [19] there are no duties which attach under Title VI. As to Constitutional requirements, it is unclear whether the Supreme Court would uphold any affirmative duty toward limited English proficient students under the Constitution. *Lau v. Nichols* did not reach that point, dealing expressly only with the issue of whether HEW had the authority under Title VI to require affirmative efforts to provide special services to limited-English-proficient students.

There are several lower court cases on the question of Constitutional and Title VI duties to provide special services. These cases treat the suits in the same manner as any other type of discrimination case under Title VI or the equal protection clause to the U.S. Constitution in that three steps of analysis are generally followed:

(1) There must first be a finding of discrimination, i.e., that the school district is not taking affirmative steps toward a goal of providing limited-English-proficient national origin minority children a "meaningful" education.

(2) Once discrimination is found, the courts require the school district to develop a remedy for that discrimination.

(3) If the school district fails or refuses to develop such a remedy, the court may then fashion its own remedy which might go beyond what would initially have been acceptable in determining the existence of discrimination in the first instance. [20]

This three-part methodology is evidenced in discrimination cases involving racial segregation. For example, in *Swann v. Charlotte-Mecklenburg Board of Education*,[21] the Court stated that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Following this philosophy, the Tenth Circuit stated in *Serna v. Portales Municipal Schools*,[22] that "in following the spirit of *Swann*, we believe the trial court, under its inherent equitable power, can properly fashion a bilingual-bicultural program which will assure that Spanish-surnamed children receive a meaningful education."[23]

In desegregation cases, it is only after a finding of discrimination and failure of the schools to desegregate on their own that the courts enter their own plan.[24] If the Education Department attempted to mandate specific school desegregation or busing plans on all school districts in the country under Title VI authority, it no doubt would be found to have overstepped its authority. Cases like *Bakke*[25] and others that approve of some affirmative action programs are inapposite, in that the courts are not saying that the Constitution or Title VI require such plans but that voluntary, affirmative action is not prohibited by law, provided certain criteria are met.

However, in the area of national-origin discrimination relating to limited-English-proficient students, the Hufstedler proposal and the "Lau Remedies" fashion a remedy applicable to all school districts without first finding discrimination or requiring the school district to remedy the situation itself. In imposing one plan, the Education Department is taking a leap -- not supported by Supreme Court cases or other legal authority -- in that it assumes Title VI discrimination is present whenever the proposed regulations' teaching methodology is not accepted. Such a leap would be unacceptable in other areas of discrimination. It should not be acceptable here.

Title VI remedies have gone beyond Constitutional requirements on an ad hoc basis, when schools have failed to provide remedies themselves. But discrimination must first be found under Title VI as well as under the Constitution. Judge Irving Hill's dissent from the Ninth Circuit opinion in *Lau* helps to pinpoint the distinction between discrimination standards and formulation of a remedy:

> The majority misapprehended the nature of the relief sought in this case. They characterize plaintiffs as seeking 'bilingual education.' Plaintiffs have carefully and repeatedly abjured any such objective...Plaintiffs seek only that defendants

> ...provide special instruction in English and that such instruction...be taught by bilingual teachers. When the majority emphasize that this is an 'English-speaking nation' and that English is the 'language of instruction' in all public schools, they set up a straw man which they have clothed in irrelevant truisms. Plaintiffs do not seek to be taught in Chinese, in whole or in part. They seek only to learn English. They claim, with apparent justification, that they cannot learn English effectively unless it is taught to them by persons who have a faculty in the only language they understand, i.e., Chinese. It seems abundantly clear that as soon as the plaintiffs have achieved enough proficiency in English to understand their teachers and classmates and participate somewhat in the course of instruction, they will expect no further Chinese to be uttered in their classes. They do not seek instruction in the Chinese language or to be taught anything in Chinese except how to speak English. [26]

The Department, under Secretary Hufstedler, has also argued, in support of its position, that the lower court on remand of the *Lau* case had directed the district to implement a complete bilingual education plan. However, as previously stated, there is an important distinction between directing the implementation of such a plan by school districts against which there has been no finding of discrimination and directing the implementation of such a plan by a school district, such as the San Francisco school district in *Lau*, which has been shown to have failed to provide any special services to the protected class and which has also failed to devise its own remedial program.

Lower Court Cases

It may be helpful, in discussing the legal implications of the proposed rule, to analyze the lower court cases which have been cited at one point or another by the Department in support of its position.

Rios v. Read, [27] was a class action alleging both Constitutional and Title VI violations in the school district's failure to provide an adequate educational program to remedy the plaintiffs' English language deficiencies. At issue was whether the plaintiffs were entitled to request discovery directed at the bilingual practices of the school district. The Court there stated that "It could hardly be argued that if a school district was found to violate *Lau* because it failed to provide any bilingual education for language disadvantaged children, a court would be required to accept without scrutiny whatever remedial program was proposed, simply because the district now could claim they were taking affirmative steps." [28]

Although the Court is inexact in its use of the word "bilingual" when it means "special services," this case does not stand for the proposition that Title VI mandates bilingual education, but merely recognizes the need for judicial supervision. The three-step process of finding discrimination, requiring a remedy, and then judicial involvement in the fashioning of a remedy in the event of a continued violation is followed.

In *Serna v. Portales Municipal Schools,* [29] a situation similar to *Lau* was presented, with the court finding that only minimal steps were taken by the district to provide an education to its limited-English-proficient national origin minority students. The circuit court affirmed the district court's order reasoning that:

> The trial court fashioned a plan which it felt would meet the needs of Spanish surnamed students in the Portales school system...under the unique circumstances of this case, the trial court's plan is (not) unwarranted...Once a right and a violation have been shown, the scope of a court's equitable powers to remedy wrongs is broad, for breadth and flexibility are inherent in equitable remedies. [30]

The circuit court further reiterated Blackmun's concurrence in *Lau* stating that "numbers are the heart of this case and only when a substantial group is being deprived of a meaningful education will a Title VI violation exist." [31]

Aspira of New York, Inc. v. Board of Education of City of New York [32] involved the interpretation of a consent decree and a determination of whether to uphold the school district's proposal to maintain a 10% cutoff for determining which students are in the class to receive special services. The court refused to accept the proposal but admitted that, if not for time constraints which mitigated toward an immediate ruling from the court, the question would have been remanded to the board for "study, analysis and better reasonable solution." [33] However, the court also rejected plaintiffs' requested standard of offering bilingual education "to all who are more fluent in Spanish than English," and finally accepted a 20% cut off, [34] stating that it seems reasonable to assume that a Hispanic student scoring better than one-fifth of his English speaking peers on the English version L.A.B. has a level of proficiency enabling him to participate effectively in English language instruction. [35] The phrase "participate effectively" was also used in the May 25th Memorandum and accepted by the Supreme Court in *Lau*.

In *U.S. v. State of Texas*, [36] after a finding that Mexican Americans were a separate and distinct national origin group under the Fourteenth Amendment and the Civil Rights Act and that a *de jure* dual school system existed which was based on the separation of students of different ethnic origins, [37] the court adopted its own plan based on the testimony of Dr. Jose Cardenas, [38] the chief consultant on the OCR Task Force which developed the "Lau Remedies." The court's plan was adopted after the plan agreed to by the Department of Justice and the district fell through, due to ineffective funding efforts.

It is indeed a long step to move from a showing of a history of discrimination in a few districts in Texas to a mandate by the Department of Education directed toward the adoption of a discrimination standard for all school districts in the country. The only case which can be said to support the Department's position is *Cintron v. Brentwood Union Free School District*, an ill-considered decision which treats the "Lau Remedies" as if they had the full force of law [39] -- a position which even the Department probably would not support.

Several cases also exist which directly contravene the Department's position. *Keyes v. School District No. 1 Denver* [40] reversed a district court order which had adopted a plan developed by Dr. Cardenas. The court held that the Cardenas plan went "well beyond helping Hispanic children to reach proficiency in English necessary to learn other basic subjects ...the (lower) court's order would impose upon school authorities a pervasive and detailed system for educating minority children." [41] The court found that no Title VI or constitutional violation had been found with regard to non-English speaking children and "even if such a violation were supported by the record we believe that the Cardenas Plan oversteps the scope of a remedy properly directed to the violation." [42] The court cited the Supreme Court's decisions in *Milliken v. Bradley*, [43] and *Wright v. Council of City of Emporia* [44] to the effect that local control over the education of children is an American tradition that permits citizen involvement in the formulation of policy to address individual needs of children. [45] "Educational policy is an area in which the courts' 'lack of specialized knowledge and experience counsel against premature interference with the informed judgments made at state and local levels.'"[46]

Guadalupe Org. Inc. v. Tempe Elementary School District #3 [47] has been one of the few cases to address head-on the issue of whether there is a duty, absent other evidence of discrimination, to provide bilingual education to limited-English-proficient students. In *Guadalupe*, plaintiffs did not complain of the school district's efforts to cure existing language deficiencies but instead contended that the school district failed to establish as a goal for its students "[competence] in reading, writing and comprehension of both the child's own language and the language of the majority culture." [48] The lower court's summary by the Ninth Circuit, which stated that the "decision of appellees to provide a predominately monocultural monolanguage educational system was a rational response to a quintessentially 'legitimate' State interest.... The Constitution neither requires nor prohibits the bilingual/bicultural education sought by appellants. Such matters are for the people to decide." [49] The court also found no duty under Title VI, reasoning that: "Assuming adequate remedial instruction, education in English reflecting American culture and values only is not a discriminatory course of conduct." [50]

In *Otero v. Mesa County Valley School District No. 51*, [51] plaintiffs sought to require the school district to provide bilingual/bicultural education to its Chicano students. The evidence, however, showed that only 3% of all elementary Mexican-American students in the district had any proficiency in Spanish and no named plaintiff demonstrated a proficiency in Spanish superior to that same student's proficiency in English. [52] The court held that there was no constitutional right to bilingual/bicultural education and no finding of a failure on the part of the school district to comply with Title VI or the Supreme Court's decision in *Lau*. [53]

The Outlook for Bilingual Education

The Department hopes to have a new proposed *Lau* regulation out within the next few months. One idea wo[illegible] consideration would require an individualized instructional plan for each student who has been identified as limited-English-proficient. The plan would include goals -- both long and short range, and a description of the specially designed instruction to be provided. Of course, the problem with this proposal is that the OCR operatives always go too far in enforcing this type of requirement and would likely treat the "goals" as "quotas." Further, since the administration is looking at the whole question of Individualized Education Plans (IEPs) under P.L. 94-142, this would not be a good time to be requiring an IEP under *Lau*. However, on the plus side of this proposal is its allowing local discretion as to the type of program to be offered to each child. It may be that an adaptation of this proposal can be devised which would work, one that would call for a detailed description of the individualized services to be required but would not require a particular type of written plan.

Another tactic would be to establish a general requirement of instruction designed to enable the student to achieve proficiency in English, "including such techniques as immersion-type English instruction or English as a second language; transitional bilingual: special, supplementary instruction in required subjects; or any other method designed to enable limited English proficient students to participate in classes where the language of instruction is English. The asset of this proposal is that it allows for local flexibility in developing methods. However, the problem with it is that it does not give the OCR operatives in the field enough guidance so as to assure that they do not resort to their old habits of enforcing the "Lau Remedies."

An optimal regulation would give OCR some kind of written document which would describe the process which a district used in assessing the students and in deciding what special services to provide to the children, with the style and content of the document left to the district's discretion. This would accomplish two purposes: first, it would require school districts, which might otherwise not do anything, to develop a process for educating these children; and second, it would provide OCR with something to look at, thus decreasing the likelihood of their prescribing their own educational methodologies.

TITLE IX OF THE EDUCATION AMENDMENTS OF 1971

Several Title IX issues currently before the courts also merit consideration in discussing the Department of Education's enforcement of Civil Rights Laws.

Currently before the Supreme Court is the case of *North Haven v. Bell*,[54] which involves the question of whether the Department of Education has the authority under Title IX[55] to prohibit discrimination in employment. The court denied certiorari last session in cases involving the same issue.[56] However, since *North Haven*, which was the first case to find in favor of the Department's regulation of employment under Title IX, a conflict has developed in the circuits.[57] While the Department of Justice is continuing to represent the Department of Education in the case, the Department, through the office of the Special Counsel to the Secretary of Education on Federal Deregulation, is re-examining its position on Title IX's coverage of employment.

Given Title VII's bar against discrimination on the basis of sex, the issue of Title IX employment coverage may be "much ado about nothing." But arguably, taking jurisdiction from the Department of Education at least relieves school districts of overlapping and duplicative enforcement by EEOC and the Department -- if in fact that is a problem.

Another aspect of Title IX was recently decided in the United States District Court for the Eastern District of Michigan, Southern Division. In *Othen v. Ann Arbor School Board*,[58] the issue arose as to whether or not Title IX applied to athletics. The court there ruled that Title IX does not apply to a school district's athletics program unless the athletics program receives direct federal funding. Since there is no federal assistance program for athletics, the effect of this ruling apparently is to eliminate OCR's Title IX jurisdiction over athletics programs, at least at the elementary and secondary level. Another case, *NCAA v. Hufstedler*,[59] pending in Kansas City, challenges the regulation as it applies to collegiate athletics.

Othen arose out of a complaint filed against the Ann Arbor, Michigan School Board by the father of two female students who had been removed because of their sex from the one golf team offered by the district. The issue of whether the district is required to provide a separate team for women was mooted by the school district's voluntary formation of such a team but the plaintiffs pressed their case on its merits in order to determine whether they would have "prevailed" and, thus, would have been entitled to attorney's fees under the Civil Rights Attorneys' Fees Awards Act of 1976.

The issue of whether Title IX applies to athletics is not new. HEW, in the preamble to its regulation, stated in response to numerous public comments that it continues to take the position that athletics constitute an integral part of the educational processes of schools and colleges and, as such, are fully subject to the requirements of Title IX even in the absence of federal funds going directly to athletics...Since the language of Title IX so closely parallels that of Title VI, in the absence of specific Congressional indications to the contrary, the Department apparently interprets Title IX consistently with interpretations of Title VI.

The *Othen* court, albeit reluctantly, disagreed with the government's analysis and held instead that Congress intended a "programmatic approach" instead of an "institutional approach" to limit the scope of Title IX, stating that "direct federal financial aid to specific education programs or activities is required before the structures of Title IX can be applied."[60]

In a discussion of the legislative history of Title IX, the court noted that an earlier version of the statute was institutional in nature, prohibiting "discrimination under any program or activity conducted by a public institution..."(emphasis supplied.) That version also failed to include the so-called "pinpoint" provision in Title IX which limits the termination of federal funds to "the particular program, or part thereof, in which such non-compliance has been so found..."

Thus, the court held that Congress intended the non-discrimination requirements to apply only to the funded program or activity -- not to the funded institution.

HEW's regulation states that the non-discrimination requirements apply to "every recipient and to each education program or activity operated by such recipient which receives or benefits from (emphasis provided) tederal financial assistance."[61] In an *amicus* brief, the United States argued that Ann Arbor receives impact aid which is placed in the general fund and therefore benefits the athletics program. This argument was rejected on the ground that "federal impact aid...does not constitute the type of federal financial assistance to a specific education program or activity envisioned by Title IX." [62] The court also pointed out that since the amount of federal impact aid funds going to Ann Arbor was only twelve-hundredths of one percent of the total budget, "this diminimus percentage of the district's total operating budget cannot form the basis for invocation of Title IX...The athletics program is not assisted by impact aid." [63]

The court also distinguished Title VI cases cited by the plaintiffs on the ground that a different constitutional standard of judicial scrutiny exists for race discrimination cases than for sex discrimination cases, and that the cases cited involved systematic racial discrimination rather than discrimination in particular programs.

HEW has had a long-standing position interpreting the "pinpoint" provision in both Title IX and Title VI to allow termination of federal funds which "are infected by a discriminatory environment..." Under this theory, for example, a school district's Title I or Impact Aid funds could be terminated because of a finding that such funds were "infected" by discrimination in athletics. The court does not expressly mention this infection theory in its opinion but it would seem that it is not given much credence.

School districts conceivably might be better off with the general "equal opportunity" standard of the Title IX regulation with regard to athletics than with some amorphous standard of equality set by the courts under the Constitution. Much time and effort were spent in developing the regulation, with the input of colleges and school districts across the country, and it is likely that the courts will do far more damage to school districts than does the regulation, especially given the political climate which is calling for equal opportunity in sports.

CONCLUSION

Until the U.S. Supreme Court rules on what a civil rights statute specifically requires, there is usually room to maneuver. Among the tactics to try are lobbying the Department of Justice and filing *amicus* briefs in cases in federal courts. Hopefully, with the new administration's changed view of the role of regulations, together with their interest in promoting equal opportunity through local creativity, school districts will be in a position to promote equal opportunity through cooperation and not coercion.

FOOTNOTES

[1] Unpublished. Copies available from NSBA.

[2] These findings were never published.

[3] 46 Fed. Reg. 10516.

[4] Department of Education press release of Feb. 2, 1981.

[5] *Id.*

[6] 33 Fed. Reg. 11595.

[7] Title VI, 42 U.S.C. 2000(d).

[8] 33 Fed. Reg. 11595.

[9] 414 U.S. 563, 94 S. Ct. 786 (1974)

[10] *Id.* at 566, 94 S. Ct. at 788.

[11] *Id.* at 568-69, 94 S. Ct. at 789.

[12] *Id.* at 564-65, 94 S. Ct. at 787.

[13] "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols" (unpublished).

[14] *See*, Cintron v. Brentwood Union Free School District, 455 F. Supp. 57, 60 (D.N.Y. 1978) (guidelines entitled to great weight); Rios v. Read, 480 F. Supp. 14, 21 (E.D.N.Y. 1978).

[15] Northwest Arctic School District v. Califano, No. A-77-216 (D. Alaska Sept. 29, 1978) (unreported).

[16] Bilingual/bicultural programs are defined as programs which utilize the student's native language and cultural factors in instructing, maintaining and further developing all the necessary skills in the student's native language and culture while introducing, maintaining and developing all the necessary skills in the second language and culture. The end result, theoretically, is a student who can function, totally, in both languages and cultures.

17 Secretary Hufstedler, at the time of the issuance of the proposed regulation, claimed that it was "the result of months of study and consultation with experts on the broad range of education issues..." In answer to a request made under the Freedom of Information Act, the Department sent NSBA a list of the "experts" and "studies" stating that "no record was kept of the names of experts we talked with... and it would be impossible to develop an accurate list from memory. However, we have been able to prepare a list of the published materials known to be available to departmental employees during the period that the "*Lau* Remedies" and the proposed regulation were developed." None of the studies or articles on the list, however, support with adequate and well controlled statistical methods the position of the department that there is one best method of teaching students with limited-English-proficiency.

18 Education for All Handicapped Children Act, 20 U.S.C. Section 1401 *et. seq.*

19 Rehabilitation Act of 1973, 29 U.S.C. Section 701 *et. seq.*

20 *See, for example*, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S. Ct. 1267 (1971).

21 *Id.*

22 499 F.2d 1147 (10th Cir. 1974).

23 *Id.* at 1154.

24 *See* Swann, *supra*.

25 Regents of University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978).

26 483 F.2d at 802 (Hill, J., dissenting).

27 480 F. Supp. 14 (E.D.N.Y. 1978).

28 *Id.*

29 499 F.2d 1147.

30 *Id.* at 1154, *citing* Swann, 402 U.S. at 15, 91 S. Ct. at 1276.

31 *Id.*

32 394 F. Supp. 1161 (S.D.N.Y. 1975) (mem.).

33 *Id.* at 1164

34 *Id.* at 1165

35 *Id.*

36 342 F. Supp. 24 (E.D. Tex. 1972) (mem.), *aff'd*, 466 F.2d 518 (5th Cir. 1972).

37 342 F. Supp. at 24, 26.

38 *Id.* at 28.

39 455 F. Supp. at 60.

40 521 F.2d 465 (10th Cir. 1975).

41 *Id.* at 482.

42 *Id.* at 481

43 418 U.S. 717, 94 S. Ct. 3112 (1974).

44 407 U.S. 451, 92 S. Ct. 2196 (1972).

45 521 F.2d at 482.

46 *Id.*, citing San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278 (1973).

47 587 F.2d 1022 (9th Cir. 1978).

48 *Id.* at 1025.

49 *Id.* at 1027.

50 *Id.* at 1029.

51 408 F. Supp. 162 (D. Colo. 1975) (mem.), vacated on other grounds, 568 F.2d 1312 (10th Cir. 1978).

52 *Id.* at 165.

53 *Id.* at 170.

54 629 F.2d 773 (2nd Cir. 1980), cert. granted, _____U.S. _____, 101 S. Ct. 1345 (1981).

55 20 U.S.C. Section 1681 (a).

56 *See*, Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir.),*cert denied*, _____U.S. _____, 100 S. Ct. _____.

57 *See, e.g.*, Dougherty County School System v. Harris, 622 F.2d 735, (5th Cir. 1980), *petition for cert.*, Dec. 22, 1980 (Docket #80-1023).

58 ______F. Supp. ______, 49 U.S.L.W. 2569 (E.D. Mich. 1981).

59 612 F.2d 473 (10th Cir. 1979).

60 ______F. Supp. _____, 49 U.S.L.W. 2569.

61 20 U.S.C. Section 1681 (a).

62 ______F. Supp. ______, 49 U.S.L.W. 2569.

63 *Id.*

DESEGREGATION LITIGATION:

WHERE WILL THE 1980s TAKE US ?

By: John T. Taylor

INTRODUCTION

No subject in school law seems to generate more litigation or more emotional disputes than the area of discrimination and desegregation. Not too long ago, the entire country watched closely the events unfolding in Louisiana between a federal court judge and a state court judge [1] on this topic.

While an entire book could be devoted to the subject of discrimination, this article will present but a brief historical overview of the subject and a look at probable litigation in the 1980s.

HISTORICAL OVERVIEW

The Supreme Court of the United States first dealt in substance and detail with the problem of desegregation in the landmark case of *Brown v. Board of Education* [2] ("Brown I"). In that case, the use of separate school facilities for negro and white students was challenged. The Supreme Court held that under the Fourteenth Amendment, plaintiffs were being deprived of their right to "equal educational opportunities," and that separate educational facilities were "inherently unequal." The Court added that the deprivation of equal educational opportunities could exist when the "tangible" factors of educational quality are present because it is the "intangible" factors which affect the quality and, therefore, the (in)equality of educational opportunities.

A year later, in *Brown v. Board of Education* [3] (Brown II), the Court held that school authorities had the primary responsibility for elucidating, assessing, and solving the problems related to desegregation. Brown II also gave rise to the practice whereby the district courts retained jurisdiction during the transition and implementation period of a desegregation plan. Among the factors that could be considered in such plans were the physical condition of a school, the school transportation system, the personnel of the school, and the attendance center boundaries.

From these cases also arose the concept that the burden of providing desegregated schools rested with the school board and that if racial imbalance remained after implementation of a desegregation plan, such imbalance was the consequence of demographic, residential or other factors which could not be reasonably attributed to school board action or inaction, past or present.[4]

By 1968, legal principles were established outlawing a dual educational system and requiring school districts to "root out" segregation.[5] These principles were then applied to many cases involving northern schools.

In *Keyes v. School District No. 1 Denver, Colorado*,[6] one of the first significant desegregation cases outside of the South, petitioners charged that the Denver School Board created and maintained racially and/or ethnically segregated schools by using such techniques as manipulation of attendance zones, a neighborhood school policy, and discriminatory school site selection. In *Keyes*, the Court found that, although the Denver system was not operated under a constitutional or statutory provision that mandated or permitted racial segregation, illegal segregation could be found if the school authorities intentionally maintained a segregated school policy. Further, the Court held that where plaintiffs had proved a *prima facie* case of *de facto* segregation in a meaningful portion of a school system, the burden shifted to the school authorities to prove that other segregated schools within the system were not also the result of intentionally segregative actions. Intent, then, became an indispensable factor in a segregation case when a board's actions were being evaluated under the equal protection clause of the Constitution.

Under the Federal Civil Rights Act of 1964,[7] discrimination based upon "race, color or national origin in any program or activity receiving federal financial assistance" is banned. To aid in enforcement of this policy, the U.S. Department of Education is authorized to withhold federal funds from school districts that do discriminate against students.

PRESENT AND FUTURE LITIGATION

Much litigation has and will result from the above cited cases and the guidelines as established by HEW. In successfully coping with this litigation, certain target areas need to be considered.

Racial Percentage and Quotas

The Supreme Court of the United States first brought forth the question of mathematical ratios in the case of *Swann v. Charlotte-Mecklenburg Board of Education*.[8] In that case, the Court approved the use of a mathematical ratio as a starting point from which integration might be accomplished and accepted the district court's order which implemented a 1970 desegregation plan by utilizing pupil reassignment, attendance zone revision, attendance unit pairings and grouping, and selective school closings. This plan required a percentage of minority students in specific schools.

Variations on the use of percentage figures occurred in the cases of *Yarbrough v. Hulbert-West Memphis School District No. 4,* [9], *McDaniel v. Barres,* [10] *and Aurora East District No. 131 v. Cronin.* [11]

In *Yarbrough*, the Court upheld a school desegregation plan which required a minimum of thirty percent of minority race students in each school. Even though the quota was established, the Court invalidated that part of the plan which would have required students to transfer monthly in order to maintain the percentage and held that transfers should not be required more often than each semester.

In *McDaniel*, the Court held that in the process of desegregating a dual school system a school board may properly make school assignments on the basis of race and that racial head counts were not unconstitutional if needed to accomplish desegregation.

The validity of an imposed percentage system and the State's right to enact rules governing such a percentage system was more recently challenged and decided in *Aurora East*. The statutes of the State of Illinois prohibit the exclusion or segregation of any student from any school on the basis of color, race, sex or nationality. Additionally, they mandated that:

> As soon as practical and from time to time thereafter, the board shall change or revise existing units or create new units in a manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race or nationality. [12]

On the basis of this statutory language, the Illinois State Board of Education, in 1971, had adopted a series of rules known as "Rules and Regulations for the Elimination and Prevention of Racial Segregation in Illinois Schools." [13]

By these rules, the State Board dictated that every school in a district must come within a racial quota. Under this quota, a segregated school existed if the "minority racial compositon of the pupils in any attendance center fails to reflect, within fifteen percentage points, the minority racial composition of the pupils in all attendance centers."

A report of racial quotas was required, and if a local school district failed to develop a workable desegregation plan and noncompliance was established, the State Board could decline to recognize the district with a consequent loss of state aid.

In invalidating the rules, the Court held that by requiring a determinate number of minority students to be assigned to each attendance center, the State Board exceeded its authority and improperly usurped the local board's discretion to consider other factors in setting boundaries for attendance centers. These "other factors" should not be the subject of State Board prerogative.

The Court also held that the State Board exceeded its statutory authority in promulgating a rule which enabled it to decline acceptance of federal funds on behalf of any local district placed on nonrecognition status by the State Board. Thus, this additional and often used tool (withholding of funds) was held to be invalid.

Although racial quotas are possible and acceptable, and although courts have both sanctioned and required quotas, the concept of government imposed quotas has, at least in one instance, been rejected. There is no doubt, however, that the power of a state or other governmental agency to impose racial quotas will be a topic for future litigation.

Testing And Minimal Competency

The entire area of alleged discrimination in testing procedures and forms has and is continuing to give rise to litigation. Unfortunately, there does not seem to be a consensus on what is or is not a proper basis for a successful discrimination suit.

As early as 1971, the rise of testing and grouping as a method of academic classification was challenged as discriminatory. In the case of *Moses v. Washington Parish School Board*,[14] the court found that the assignment of pupils to classrooms based upon standardized ability and achievement tests tended to segregate pupils by race. As a result, the court held that where such tests tended to perpetuate segregated classrooms, the school board was prohibited from relying on them for the assignment of pupils.

Within the last two years, several challenges to the use and utilization of I.Q. tests have been mounted. One challenge arose in California in the case of *Larry P. v. Riles*,[15] while the other, *Parents in Action on Special Education (PASE) v. Hannon*,[16] came from Illinois.

The findings and holdings in these two cases give no clear solution to the problem at hand since each judge reached a conclusion different from the other. In the *Larry P.* case, the court held that the evidence established that I.Q. tests were culturally biased against black students and resulted in misplacement of black children in special classes for the educable mentally retarded. With that holding, the court then issued a permanent ban on the use of the Stanford-Benet, Wechsler and Lenter I.Q. tests for placement in special education classes in California.

The same question was also raised in *Parents in Action on Special Education v. Hannon* in that an allegation was made that the standard intelligence tests administered by the Chicago schools were culturally biased against black children. The tests were used in conjunction with the statutorily mandated "other criteria for determining an appropriate educational program for a child" [17] in the placement of children in educable mentally handicapped programs. In rejecting the plaintiffs' allegations, the court held that "plaintiffs have failed to prove their contention that the Wechsler and Stanford-Benet I.Q. tests are culturally unfair to black children." [18]

It is interesting to note that the court found that the school board did not have the burden of proof. Part of this reasoning was based upon the fact that the test scores were only one factor that was considered by the school authorities prior to placement.

In holding in favor of the board, the judge noted that his decision differed from that in the *Larry P.* case, but said that this difference was caused by his detailed examination of the items on the tests. [19]

I.Q. and other achievement tests are not the only types of tests to be challenged. In this modern day and age, more and more states are developing or requiring the development of minimum competency tests. The entire area of discrimination in the use of these tests was raised in the case of *Debra P. v. Turlington.* [20] In that case, plaintiffs challenged the use of such tests on several bases. The two most important issues raised were (1) whether the test was designed or implemented so as to create a racially biased situation; and (2) whether the use of remedial classes for students failing the examination was a vehicle or mechanism for resegregating the Florida public schools.

The court held that the test itself and the use thereof bore a rational relation to a valid state interest and thus was constitutional. In doing so, however, the court enjoined the use of said test as a requirement for graduation for a period of four (4) years. This injunction was based upon the prior history of segregation in the Florida schools and based upon the failure rate of black children when given the test. In commenting thereon, the court said that "punishing the victims of past discrimination for deficits created by an inferior educational environment neither constitutes a remedy nor creates better educational opportunities."[21]

It is interesting to note that despite the above injunction, the court refused to enjoin the use of remedial classrooms. Under the Florida plan, those students failing the test were required to be placed in compensatory education classes. Because a disproportionate number of black students failed the test, the compensatory program contained a disproportionate number of black children. The court made special note of two factors which had influenced its decision, first, the progression of students out of the program seemed to be fluid, and second, the program itself constituted only at most two classes or hours per day, thereby allowing the remainder of the day to be spent in the regular classroom.[22]

It would appear from the above cited cases that the use of achievement or minimal competency tests must be carefully analyzed and utilized. Litigation questioning any test or its use is always a present possibility. Since special education is mandated and since minimum competency is needed, the 1980 s should see a multitude of cases raising significant questions in these two areas.

Bilingual Education

In recent years, there has been a growing body of law in the area of bilingual education. It is obvious that most, but not all, of this law has arisen in the metropolitan areas. The Civil Rights Act of 1964[23] has been used as the primary vehicle by which charges of discrimination have been leveled for failure to provide bilingual education. The leading case in this area is *Lau v. Nichols*,[24] where the Supreme Court held that the failure of the San Francisco school system to provide English language instruction to approximately 1,800 students of Chinese ancestry who did not speak English denied such students a meaningful opportunity to participate in the public educational program and thus violated the *Civil Rights Act*.

A corollary of *Lau* was found in the case of *Martin Luther King Elementary School Children v. Ann Arbor School District*.[25] In it, an action was brought under the Equal Educational Opportunities Act,[26] which proscribes the denial of equal educational opportunities to an individual on account of race by the failure of "an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program." The parties claimed that they spoke "black vernacular" which had resulted in impeding their equal participation in instructional programs. In holding for plaintiffs, the court ordered the school board to take steps to help teachers recognize the home language of students and to use that knowledge in their teaching of reading skills and standard English.

Metropolitan Desegregation

The litigation of the 1980s will in most respects likely be similar to the litigation of the 1970s as it applies to desegregation of metropolitan areas. Many of the earlier cases were decided on the basis of whether a school district was guilty of *de jure* segregation or *de facto* segregation. *De jure* segregation is that which is imposed by a state either through operation of its agencies or through its laws, while *de facto* segregation exists "where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." [27]

This distinction, however, is not as important as it once was. Many of the more recent cases have blurred the concept of determining segregation on the basis of *de jure* or *de facto*. In *Dayton Board of Education v. Brinkman*, [28] (Dayton I), the Court held that because at the time of the *Brown* I decision, the Dayton Board was operating a dual system, it had an affirmative duty thereafter to eradicate the effects of a dual system.

The failure to fulfill this affirmative obligation meant a liability finding in *Dayton Board of Education v. Brinkman*, [29] (Dayton II). The Court held that even if there was no direct evidence of continuing discriminatory purpose, the Dayton Board still had to do more than merely abandon its prior discriminatory conduct. It had an affirmative duty to engage in practices that would not perpetuate or re-establish the dual school system.

This decision should be coupled with the decision in *Columbus Board of Education v. Pennick*, [30] in which the Court held that the proof of liability in a post-*Brown I* case is determined in part by whether the board's failure to desegregate the system since *Brown I* had an impact that was systemwide.

These cases were both cited in *Lora v. Board of Education of the City of New York*, [31] in which the court applied yet another criterion, e.g., that "foreseeable result" was one type of relevant evidence of a racially discriminatory purpose.

CONCLUSION

As indicated earlier, metropolitan desegregation in the 1980s will bear much resemblance to that of the 1970s. Such litigation will continue to be brought forth, and the schools must be prepared for the impact and ramifications of such litigation in the 1980s.

FOOTNOTES

1 Valley v. Rapids Parish School Board, _____ F. Supp. _____ (W.D. La. 1980, *aff'd* in part, *rev'd* in part and *remanded*, ____ F.2d _____, No. 80-3722, 80-3776, 80-3988, and 80-3855 (5th Cir. May 18, 1981).

2 347 U.S. 483, 74 S. Ct. 686 (1954).

3 349 U.S. 294, 75 S. Ct. 753 (1955).

4 Mapp v. Chattanooga Board of Education, 329 F. Supp. 1374 (E.D. Tenn. 1971).

5 Green v. School Board of New Kent County, 391 U.S. 430 (1968).

6 413 U.S. 189, 93 S. Ct. 2686 (1973).

7 42 U.S.C. Section 2000(c), Title IV and Section 2000(d), Title VI.

8 402 U.S. 1, 91 S. Ct. 1267 (1971).

9 457 F.2d 333 (8th Cir. 1972).

10 402 U.S. 39, 91 S. Ct. 1287 (1971).

11 No. 80-170, ______ Ill. App. 3d _______, _____ N.E.2d ______ (1981), leave to appeal granted June 8, 1981, Appellate Court for 2d District Illinois (No. 54738).

12 *Illinois Revised Statutes* Ch. 122, Section 10-21.3 (1963).

13 Nov 22, 1971. The rules are a partial implementing regulation for the Armstrong Act. Illinois Revised Statutes, Ch. 122, Section 10-21.3.

14 456 F.2d 1285 (5th Cir. 1971), *cert. den.*, 409 U.S. 1013, 93 S. Ct. 431 (1972).

15 495 F. Supp. 926 (N.D. Cal. 1979).

16 506 F. Supp. 831 (N.D. Ill. 1980).

17 506 F. Supp. 883, *citing* 20 U.S.C. Section 1412(2)(D)(S).

18 *Id.* at 878.

19 *Id.* at 882.

20 474 F. Supp. 244 (M.D. Fla., 1979).

21 *Id.* at 257.

22 *Id.* at 268.

23 42 U.S.C. Section 1000(d).

24 414 U.S. 563, 94 S. Ct. 786 (1974).

25 473 F. Supp. 1371 (E.D. Mich. 1979).

26 20 U.S.C. Section 1703(f).

27 402 U.S. 1, 91 S. Ct. 1267.

28 433 U.S. 406, 97 S. Ct. 2766 (1977).

29 443 U.S. 526, 99 S. Ct. 2971 (1979).

30 443 U.S. 449, 99 S. Ct. 2941 (1979).

31 623 F.2d 248 (2d Cir. 1980).

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